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Canadian “Dreamers”: Access to Postsecondary Education

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Introduction

When people migrate or are forced to flee their home countries, their children must often accompany them. Many such children grow up in Canada with precarious legal status, attending Canadian elementary and high schools and sharing the dreams of their Canadian citizen and permanent resident peers. Unfortunately, once they graduate from high school, many of these young people are blocked from pursuing those dreams due to formal and informal barriers to postsecondary education.

Salma is one of the young people who have faced this difficult scenario.[1] When she arrived in Toronto as a refugee claimant with her family, she enrolled in high school, did well in her classes and was encouraged by her teachers to pursue a postsecondary education. When it came time to apply to college, Salma's family was still waiting to have their refugee status determined. Salma knew that her status in Canada could remain precarious for months, so she approached her guidance counselor to ask if this would affect her ability to apply to college. Her counselor was not sure, but encouraged her to apply anyway. Salma described what happened next as follows:

> I went and applied to three colleges […] I received the acceptance letter and I was ecstatic! It was a simple letter, but it meant I had the key to start a new chapter, the future I wanted. I did not know about the fees until it was too late. I received another letter, this time it was the one that brought me back to reality and flat out told me I couldn't access school. As a refugee claimant, I needed to pay international fees. The fees were too high for what the scholarship would give me. The deadline was too close for me to even access the money from the scholarship… There was nothing I could do. I was not going to be attending College.[2]

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[1] FCJ Youth Network, *Uprooted Education: 2015–2016 Ontario Report* (Toronto: FCJ Refugee Centre, 2016) at 38 [FCJ Youth Network, *Uprooted*].

[2] *Ibid*.

Salma's experience is, unfortunately, not unique. There are estimated to be between 200,000 and 500,000[3] precarious legal status ("PLS") migrants[4] in Canada, many of whom graduate from Canadian high schools every year.[5] Many PLS students, like Salma, are blocked from accessing postsecondary education either because they do not have study permits or because they cannot afford prohibitively expensive international tuition fees.[6]

Although several provinces have legislation enabling access to primary and secondary education for students under 18 regardless of their immigration status,[7] there is no legislation ensuring access to colleges and universities for these students.[8] Moreover, with the exception of one program at York University discussed in this article, no Canadian colleges or universities have created pathways to facilitate access to postsecondary education for PLS students.

In the United States ("US"), the activism of undocumented youth (who are popularly known as "Dreamers")[9] has resulted in a wealth of scholarship on the complicated legal questions that arise in connection with admitting these students to college or university.[10] Much of the American

[3] Research on the number of people living with precarious status in Canada is notoriously difficult, but the 200,000 to 500,000 range is sometimes pointed to as a reasonable estimate. For a discussion, see Luin Goldring, Carolina Bernstein & Judith K. Bernhard, "Institutionalizing Precarious Migratory Status in Canada" (2009) 13:3 Citizenship Studies 239 at 242 [Goldring, Berinstein & Bernhard]; Luin Goldring & Patricia Landolt, *Producing and negotiating non-citizenship: precarious legal status in Canada*, (Toronto: University of Toronto Press, 2013). Other sources point to the likelihood of there being at least, if not more, than 500,000 undocumented individuals in Canada. For a discussion, see Anthony Delisle & Delphine Nakache, "Humanitarian and Compassionate Applications: A Critical Look at Canadian Decision-Makers' Assessment of Claims from 'Vulnerable' Applicants", (2022) 11:40 Laws 1 at 16; Migrant Rights Network, "Canada rejected double the number of humanitarian applications for immigration in 2020" (13 July 2021), online: <https://migrantrights.ca/hc202rejections/>.

[4] This term is discussed below, see footnotes 23-24 and accompanying text.

[5] For details about these estimates, see Faria Kamal and Kyle D. Killian "Invisible Lives and Hidden Realities of Undocumented Youth" (2015) 31:2 Refuge 63 at 63 [Kamal & Killian]; Canada, Parliament, House of Commons, Committee on Citizenship and Immigration, *Temporary Foreign Workers and Nonstatus Workers*, 40th Parl, 2nd Sess, No 98 (2009) (Chair: David Tilson) at 47.

[6] For details about the ways in which "the immigration and schooling systems in Canada intersect to deny access to migrant youth with precarious status throughout educational trajectories" see Paloma E. Villegas and Tanya Aberman, "A Double Punishment: Postsecondary Access for Racialized Migrant Youth with Precarious Status in Toronto, Canada" (2019) 35:1 Refuge 72 [Villegas & Aberman].

[7] Discussed below, at pages 13-15.

[8] Tanya Aberman, Francisco Rico-Martinez and Philip Ackerman, "School Outside These Four Walls: Contesting Irregularization Through Alternatives to Education" (2017) 43:3 Migration Studies – Review of Polish Diaspora 131 at 139 [Aberman, Rico-Martinez & Ackerman].

[9] See generally Walter J. Nicholls, *The Dreamers: How the Undocumented Youth Movement Transformed the Immigrant Rights Debate* (Stanford: Stanford University Press) 2013 [Nicholls].

[10] See e.g. Kristen Green, "Sanctuary Campuses: The University's Role in Protecting Undocumented Students from Changing Immigration Policies" (2019) 66:4 UCLA L Rev 1030 [Green]; Natasha Newman, "A Place to Call Home: Defining the Legal Significance of the Sanctuary Campus Movement" (2017) 8:1 Columbia J of Race & L 122 [Newman]; Aleksandar Dukic, Stephanie Gold & Gregory Lisa, "Key Legal Considerations Relating to Sanctuary Campus Policies and Practices" (2018) 44:1 JC & UL 23 [Dukic, Gold & Lisa]; Danielle Holley-Walker, "Searching for Equality: Equal Protection Clause Challenges to Bans on the Admission of Undocumented Immigrant Students to Public Universities" (2011) 2011:2 Michigan State L Rev 357 [Holley-Walker]; Irma Aboytes, "Undocumented Students and Access to Higher Education: A Dream Defined by State Borders" (2009) 12:3 J Gender Race & Just 579 [Aboytes]; Josue Espinosa, "Undocumented, Uneducated, Unconstitutional: An Equal Protection Analysis of State Laws the Ban Undocumented Immigrants from Higher Education" (2017) 21:1 Holy Cross J of L & Public Policy 139 [Espinosa]; Elizabeth M. McCormick, "Federal Anti-Sanctuary Law: A Failed Approach to Immigration Reform and

literature situates the "Dreamers" movement within "the historical construction of recombinations of race, criminality, and notions of inferior citizens" – framing undocumented student activists, who "are overwhelmingly people of colour", as continuing the work of student organizations that challenged racial segregation in the 1960s.[11]

In Canada, as in the US, PLS youth activists and their advocates have called for expanded access to postsecondary education for many years.[12] Canadian academics in several disciplines have discussed the barriers that they face at length, including the persistence of "race, class, and gender-based labour stratification" despite the removal of racist language in Canadian immigration legislation.[13] Indeed, those who work closely with PLS youth have highlighted that "as racialized individuals, [PLS] students often experience myriad adversities while in school through streaming, lowered expectations based on race, criminalization, limited mentoring, etc."[14]

Canadian legal scholars, however, have yet to address the legal issues that expanding PLS students' access to postsecondary education raises. This article seeks to fill this gap.

This article begins by exploring York University's "Access for Students with Precarious Immigration Status Program" ("the Access Program"), outlining how the program came to be and how it addresses barriers faced by PLS students. Next, the article considers the legality of such a

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a Poor Substitute for Real Reform" (2016) 20:135 Lewis & Clark L. Rev. 214; Virgil Wiebe, "Immigration Federalism in Minnesota: What Does Sanctuary Mean in Practice" (2017) 13:3 U of St. Thomas LJ 581.

[11] Laura Emiko Soltis, "From Freedom Schools to Freedom University: Liberatory Education, Interracial and Intergenerational Dialogue, and the Undocumented Student Movement in the U.S. South" (2015) 17:1 Souls 20 at 21-22 [Soltis].

[12] See e.g. Tanya Aberman, Francisco Villegas, and Paloma E. Villegas, eds., *Seeds of Hope: Creating a Future in the Shadows* (Toronto: FCJ Refugee Centre, 2016) [Aberman, Villegas & Villegas]; Francisco J. Villegas, "'Access without Fear!': Reconceptualizing 'Access' to Schooling for Undocumented Students in Toronto" (2017) 43:7-8 Critical Sociology 1179; FCJ Youth Network, *Youth to You* (Toronto: FCJ Refugee Centre, 2016) [FCJ Youth Network, *Youth to You*]; FCJ Youth Network, *Uprooted*, *supra* note 1.

[13] Sarah Marsden, "The New Precariousness: Temporary Migrants and the Law of Canada" (2012) 27:2 CJLS 209 at 212 [Marsden, *New Precariousness*]. See also, e.g. Francesca Meloni, "The Ambivalence of Belonging: The Impact of Illegality on the Social Belonging of Undocumented Youth" (2019) 92:2 Anthropological Quarterly 451 [Meloni]; Kamal & Killian, *supra* note 5; Judith K. Bernhard, Luin Goldring, Julie Young, Carolina Berinstein and Beth Wilson, "Living with Precarious Legal Status in Canada: Implications for the Well-Being of Children and Families" (2007) 24:2 *Refuge* 101 [Bernhard et al]; Julie Young, "This Is My Life: Youth Negotiating Legality and Belonging in Toronto," in Luin Goldring and Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, (Toronto: University of Toronto Press, 2013) 99 [Young]; Maria Yau, "Refugee Students in Toronto Schools" (1996) 15:5 *Refuge* 9; Francisco J. Villegas "'Don't ask, don't tell': examining the illegalization of undocumented students in Toronto, Canada" (2018) 39:8 *British Journal of Sociology of Education* 1111 [Villegas, F.]; Graham Hudson, Idil Atak, Michele Manocchi and Charity-Ann Hannan, "(No)Access T.O.: A Pilot Study on Sanctuary City Policy in Toronto, Canada" (2017) Ryerson Centre for Immigration & Settlement Working Paper No. 2017/1 [Hudson et al]; Villegas & Aberman, *supra* note 6; Paloma E. Villegas, "Bridging Borders: Teaching a Bridging Course with Precarious Status Students Transitioning to the University" in Francisco J. Villegas and Janelle Brady, eds, *Critical Schooling: Transformative Theory and Practice* (New York: Springer, 2019) 245 [Villegas, P.]; Aberman, Rico-Martinez & Ackerman, *supra* note 8; Tanya Aberman and Philip Ackerman with members of the FCJ Refugee Centre's Youth Network, "Isn't the Right to an Education a Human Right?": Experiences of Precarious Immigration Status Youth Navigating Postsecondary Education" in Sara Carpenter and Sharhrzad Mojab, eds, *Youth as/in Crisis: Young People, Public Policy and the Politics of Learning* (Rotterdam: Sense Publishers, 2017) 127; Tanya Aberman, "Expanding access to postsecondary education at York University (and beyond) for students with precarious immigration status" (2015) *FCJ Refugee Centre and York University Faculty Association* [Aberman].

[14] Aberman, Villegas & Villegas, *supra* note 12 at 63.

program through a close analysis of the relevant provisions of the *Immigration and Refugee Protection Act* (the "*IRPA*"). The article argues that although the *IRPA* contains a provision which could theoretically be used to penalize colleges, universities or their employees for admitting foreign national students who do not possess study permits, charges and prosecutions using these provisions are highly unlikely. Moreover, if such charges were pursued, there is a good argument to be made that the Courts would find the relevant provisions unconstitutional. Finally, the article argues that even if convictions were theoretically possible, these programs should be pursued nonetheless.

Our hope is that by addressing some of the legal issues which may otherwise deter colleges and universities from replicating York University's program, we can encourage other institutions to create additional Access Programs.

Before embarking on this argument, we would like to note a few limitations on what we are hoping to achieve with this article.

First, this article aims to address a narrow question about the legality of post-secondary institutions offering admission to PLS Students. In other words, the article's starting point is that at least some post-secondary institutions would like to provide access to education for PLS students, and we ask what the law has to say about providing such access. Others have offered arguments about why universities and colleges should want to do so.[15] Readers who are interested in that question – and in considering possible counterarguments, including arguments related to immigration program integrity – are encouraged to consult the existing literature on the topic.[16]

Second, because the article focuses on the legality of universities and colleges offering admission to PLS Students, we do not take on arguments about the legality of PLS students themselves pursuing post-secondary education. Instead, we begin with the assumption that PLS students are legally prohibited from pursuing post-secondary education and ask if universities and colleges are also prohibited from admitting them. We acknowledge that PLS students choosing to study unlawfully may face immigration law consequences – both in terms of direct legal consequences and in terms of enhanced exposure to potential immigration enforcement. We also acknowledge that university administrators may reasonably be concerned about these potential consequences when deciding whether to create pathways for admission for these students. However, the question of whether it is in the best interests of any specific potential PLS student to risk those consequences will depend on the individual's circumstances, including their precise immigration status. For PLS students who have some type of temporary status, studying without a permit may leave them vulnerable to losing that status, and thus to removal from Canada.[17] Other PLS students may already

[15] See e.g., Villegas & Aberman, supra note 6; Marietta Armanyous & Graham Hudson, "Barriers vs. bridges: Undocumented immigrants' access to postsecondary education in Ontario" (December 2019) 2019:5 RCIS Working Paper, online: <https://docplayer.net/172709721-Barriers-vs-bridges-undocumented-immigrants-access-to-post-secondary-education-in-ontario.html> [Armanyous & Hudson].

[16] *Ibid*.

[17] Section 30(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] and section 212 of the *Immigration and Refugee Protection Regulations* SOR/2002-227 [*IRPR*] prohibit foreign nationals (including PLS students) from studying in Canada without a permit in many circumstances. Section 41 of the *IRPA* renders people who do not comply with *IRPA* inadmissible to Canada. Section 44 of the *IRPA* provides sweeping discretion to immigration officers to commence procedures leading to removal of inadmissible foreign nationals. Thus, a PLS student who is

be inadmissible to Canada, and are therefore already vulnerable to removal.[18] For others, studying unlawfully could, in some circumstances, increase their chances of securing permanent residence ("PR").[19] In practice, many PLS youths' decisions will not be between studying without a permit on the one hand and complying with immigration rules on the other. Rather, in many cases the decision will be between studying without a permit or working without authorization,[20] both of which carry enforcement risks. PLS students are best placed to assess these unique circumstances and to consider the benefits and risks of pursuing post-secondary education in those circumstances – though ideally, prospective PLS students would have access to campus legal clinics or other ways of obtaining legal assistance to help them weigh those risks.[21] Ultimately, though, we are interested in what universities should do when at least some PLS students decide that undertaking post-secondary education is, in their unique circumstances, worth the risks.

Third, this article is not aimed at law reform. One day, we hope to see legislative change to explicitly authorize PLS students to study at the postsecondary level in Canada – or, better yet, reliable pathways for providing secure immigration status for all people with PLS.[22] In the meantime however, this article asks whether, given existing laws, there are legal impediments

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authorized to be in Canada but not to study in Canada who chooses to study without a study permit may be subject to a removal order if found in contravention of *IRPA* or *IRPR*.

[18] For example, PLS students who are in Canada without authorization may be inadmissible on multiple grounds (see e.g., *IRPA*, *supra* note 17, s 40, 41, and are thus already vulnerable to an immigration officer commencing procedures that lead to removal under s 44 of the *IRPA*. Inadmissibility is binary, meaning students who are already inadmissible would not become "more" inadmissible by studying without a permit.

[19] PLS students can apply to regularize their immigration status by applying for PR through a humanitarian and compassionate ("H&C") application, which is a highly discretionary application which provides immigration officers with the "flexibility to approve deserving cases not anticipated in the legislation". One factor that is assessed in H&C applications is whether the applicant has demonstrated successful establishment. See *IRPA*, *supra* note 17, s 25. Government of Canada, "Humanitarian and Compassionate Assessment Establishment in Canada", Immigration, Refugee and Citizenship Canada (n.d.) online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-establishment-canada.html>. It can be difficult to predict outcomes in H&C applications, which often seem arbitrary (see e.g., Anthony Delisle & Delphine Nakache, "Humanitarian and Compassionate Applications: A Critical Look at Canadian Decision-Makers' Assessment of Claims from 'Vulnerable' Applicants", (2022) 11:40 Laws 1). Some caution is also warranted, as some officers take a negative view of establishment gained without authorization - a position supported in some Federal Court case law (see e.g., discussion in Browne v. Canada (Citizenship and Immigration), 2022 FC 514 at para 28). Nonetheless, the Federal Court has overturned many negative H&C decisions which placed an undue focus on the applicant's lack of status (see, e.g., McDonald v. Canada (Citizenship and Immigration), 2022 FC 394 (CanLII) at para 24). It stands to reason that the establishment demonstrated by studying at a post-secondary institution may be considered a positive factor in an H&C application. In the experience of Francisco Rico-Martinez, the Co-Director of the FJC Refugee Centre and one of the co-authors of this article, H&C applications with evidence of post-secondary education were more likely to succeed than other similar applications. However, that is merely anecdotal experience, and it involves a small (and possibly skewed) sample, so caution is necessary in generalizing.

[20] Kamal & Killian, *supra* note 5 at 65.

[21] At York University, prospective low income PLS students can obtain summary legal advice about immigration law matters and assistance with H&C applications for PR via Osgoode Hall Law School's Community & Legal Aid Services Program. See Community & Legal Aid Services Program, "Legal Services", online: <https://www.osgoode.yorku.ca/community-clinics/welcome-community-legal-aid-services-program-clasp/legal-services/>.

[22] See e.g., Migrant Rights Network, "Open Letter: Full Immigration Status for All" (2022) online: <https://migrantrights.ca/status-for-all>; Joseph H. Carens, *Immigrants and the Right to Stay* (Boston: MIT Press, 2010); Canadian Council for Refugees, "Proposal for regularization of individuals and families without status" (June 2006) online: <https://ccrweb.ca/en/proposal-regularization-individuals-and-families-without-status>;

preventing post-secondary institutions from admitting PLS students and, if so, how post-secondary institutions that want to admit PLS students should respond in the face of those impediments.

Part 1: Access to Postsecondary Education for PLS Students

This part will begin by discussing the term "precarious legal status" before outlining some of the legal categories which fit beneath this umbrella. Through this, we will explain how these categories affect PLS students' ability to pursue a postsecondary education in Canada. We will then discuss three key barriers which PLS students in Canada face in accessing postsecondary education. This part will conclude by outlining how York University's Access Program addresses these barriers.

Why do we use the term "precarious legal status" migrants?

In recent years, the Canadian Government has "increasingly relied on temporary status to manage migration", which, in turn, "facilitates multitude forms of temporariness."[23] The term "precarious legal status" was chosen rather than the terms "illegal" or "undocumented" to describe such "temporariness" because we agree with sociologist Luin Goldring and her colleagues that it is important to draw attention to how status is constructed and how it shifts. This terminology "disturbs interrelated assumptions about the stability, coherence and boundaries of concepts such as citizenship and illegality", including the fact that the precarious nature of many migrants' status is a product of legal choices made by the government, and not a characteristic of the migrants themselves.[24]

For the purposes of this paper, we adopt a definition of precarious legal status that focuses on migrants' inconsistent access to four elements normally associated with Canadian PR and citizenship: (1) work authorization, (2) the right to remain permanently in Canada, (3) the lack of dependence on a third party for one's right to be in Canada and (4) social citizenship rights.[25]

This framework brings "many legally distinct migrant situations together" based on their "differential entitlement to benefits".[26] The most relevant of those benefits as they relate to PLS students wishing to pursue a postsecondary education are (1) the ability to obtain a study permit; (2) the ability to be considered a "domestic" student for the purpose of tuition fees; and (3) the ability to access student financial aid.

Legally Distinct Migrant Situations

[23] Amrita Hari and Jamie Chai Yun Liew, "Introduction to special section on: precarity, illegality and temporariness: implications and consequences of Canadian migration management." (2018) 56:6 International Migration 169 at 170 [Hari & Liew].
[24] Goldring, Berinstein & Bernhard, *supra note 3* at 241.
[25] *Ibid* at 240.
[26] Sarah Marsden, "Silence Means Yes Here in Canada: Precarious Migrants, Work and the Law" (2014) 18:1 CLELJ 1 at 5 [Marsden, *Silence*].

The most stable status in the country is, of course, citizenship,[27] followed by PR and "protected person" status. PR carries most of the rights and privileges that citizens enjoy,[28] though Permanent Residents ("PRs") can more easily lose their status.[29]

The "protected person" category includes both resettled refugees (who are determined to be Convention refugees before coming to Canada and who land in the country as PRs) and inland refugee claimants who have had their refugee claims granted by the Immigration and Refugee Board. Inland refugee claimants can only apply for PR after their claim is accepted, a process which can take anywhere from several months to several years from the time the application is submitted.[30] All other legal statuses are, to some extent, precarious, but carry with them differing levels of access to certain rights and privileges in Canada.

On the opposite end of the spectrum are several precarious statuses which confer very few rights and privileges. For example, entirely undocumented migrants have been described as representing "the extreme of precarious migration status" because they do not have the right to enter and remain in Canada or to access most social benefits.[31]

Other "documented" PLS migrants in Canada face similar barriers. For example, there are many individuals who have made refugee claims that have been refused ("refused refugee claimants") who are seeking other means of remaining in the country. There are also individuals attempting to regularize their status in the country by applying for PR through a Humanitarian and Compassionate application ("H&C applicants") or other means.

It is important to note that each of these legal statuses are subject to change. For example, if an H&C applicant's application for PR is approved, they will receive a notice indicating that their application has been "approved in principle". In that case, although they have been accepted "in principle" for PR,[32] they will not acquire all of the rights and privileges that come with PR until

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[27] For a discussion of how PRs become citizens, see Sharryn J. Aiken et al, *Immigration and Refugee Law: Cases, Materials and Commentary, Second Edition* (Toronto: Emond Montgomery Publications Limited, 2015) at 1063-1095.

[28] For important exceptions, see Canada, Immigration, Refugees and Citizenship Canada, "Understand permanent resident status" (2020) online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html> accessed March 28, 2020.

[29] For details about common ways in which PRs can lose their status, see Lorne Waldman, *Inadmissible to Canada: The Legal Barriers to Canadian Immigration* (Toronto: LexisNexis Canada, 2018) [Waldman, *Inadmissible to Canada*]. See also Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014) 40:1 Queen's LJ 1.

[30] At the time of writing, this process was estimated to take approximately 24 months. See Canada, Immigration, Refugees and Citizenship Canada, *My Immigration or citizenship application: check processing times* (2022) online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/check-processing-times.html> accessed November 22, 2020 [Canada, *My Application*]. See also Samantha Jackson and Harald Bauder, "Neither Temporary, Nor Permanent: The Precarious Employment Experiences of Refugee Claimants in Canada" (2014) 27:3 J of Refugee Studies 360 at 361-362 [Jackson & Bauder].

[31] Marsden, *New Precariousness*, *supra* note 13 at 220-221.

[32] We refer to both "H&C applicants who have been approved in principle" and "H&C applicants". The latter are still awaiting a determination on their H&C applications.

various background checks have been conducted to ensure that they are not inadmissible.[33] The process of becoming "landed" as PRs can take several years. [34]

Another category of PLS migrants are inland refugee claimants, those who have made a claim for refugee protection in Canada but who are still awaiting a hearing or a decision as to whether they will be granted protected person status. Inland refugee claimants' stays in Canada are often lengthy, with some remaining "in limbo within the determination system for as long as ten years".[35]

Other foreign nationals who are not (yet) PRs may also become PLS migrants. For example, many migrants' temporary status in the country is dependent on a family member, such as spouses and "dependent" family members of Canadian citizens or PRs. Temporary foreign workers ("TFWs") and their dependants' status is also relatively precarious, as their status in the country is often dependent on a specific employer.[36] If their temporary authorization lapses, they too could become PLS migrants.[37]

Young PLS migrants could be in any of the legal categories outlined above, dealing with situations of precarity for years. This means that many PLS students have lived in Canada for the formative years of their lives, often successfully completing years of primary and secondary schooling in the country, paying taxes and contributing to their communities in a variety of ways.[38]

Differences Between International Students and PLS Students

A final category of migrants with non-permanent status are international students. The rights of international students to remain, work and receive social benefits in Canada are limited and contingent – and thus they fit squarely within the PLS framework we have set out above. However, for the limited purposes of this paper we are excluding international students from our definition of PLS migrants. This distinction is necessary because international students differ from the students

[33] Sections 34 to 42 of the *IRPA* identify several grounds on which foreign nationals or PRs can be removed from Canada or denied a visa, including, amongst others, health grounds, criminality, non-compliance with the act, having inadmissible family members and the commission of human and international rights violations. For details, see Waldman, *Inadmissible to Canada*, *supra* note 29.

[34] At the time of writing, this process was estimated to take approximately 20 months for H&C applicants. Canada, *My Application*, *supra* note 30.

[35] Jackson & Bauder, *supra* note 30, at 370-371. For details of about delays in refugee protection decision, see Office of the Auditor General of Canada, "Processing of Asylum Claims" (Reports of the Auditor General of Canada to the Parliament of Canada, 2019) at 2.12 and 2.25-2.26.

[36] For details about how TFWs are made precarious, see Marsden, *New Precariousness*, *supra* note 13, at 216-218.

[37] For a discussion of "how people become undocumented" see Kamal & Killian, *supra* note 5 at 64.

[38] Aberman, *supra* note 13 at 6.

discussed in this paper in two important ways.[39] First, unlike international students, who travel to Canada from their home countries specifically to study at Canadian colleges or universities (typically once they have reached the age of majority), many PLS students were brought here as minors.[40] As one "dreamer" in the US explained, "I didn't ask to come here, I was brought here."[41] Secondly, international students apply to Canadian schools from their home countries despite high international student fees, and they are required to demonstrate that they have the financial means to pay the fees and to support themselves during their studies before they are permitted to travel to Canada.[42] Of course, we recognize that the circumstances of international students may change and that immigration statuses may shift (e.g. international students may fall out of status).[43] We also share the concerns expressed by many observers about the tendency of Canadian universities to exploit the immigration aspirations of international students for profit, sometimes treating them more as high-margin resource streams than as learners.[44]

Nonetheless, the fact that international students are legally authorized to study and came to Canada for that specific reason, despite high international tuition fees, means that they are differently situated than the students who are the focus of this paper.

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[39] *For a discussion of international student's access to various benefits see Patricia Mirwaldt, "Health and Wellness Services" in Donna Hardy Cox and C. Carney Srange eds., Achieving Student Success: Effective Student Services in Canadian Higher Education, (Montreal & Kingston: McGill-Queen's University Press) 124. See Keegan Williams, Gabriel Williams, Amy Arbuckle, Margaret Walton-Roberts and Jenna Hennebry, International Students in Ontario's Postsecondary Education System, 2000-2012: An evaluation of changing policies, populations and labour market entry processes (Toronto, The Higher Education Quality Council of Ontario: 2015).*

[40] Not all PLS youth are "brought" to Canada – many come to the country as unaccompanied minors. A discussion of the different barriers faced by unaccompanied PLS youth and other PLS youth is beyond the scope of this paper. However, it is important to note that unaccompanied minors, who do not have family members present in the country to help support and advocate for them, face additional barriers.

[41] Nicholls, *supra* note 9 at 53. Although we are differentiating between PLS students and international students for the narrow purposes of this paper, we caution our reader from using this differentiation to perpetuate "[n]arratives of deserving and undeserving immigrants". For a discussion of how problematic such narratives can be and details about why many "Dreamers" in the US "rejected the 'good immigrant' trope that had guided much of their public image", see Sujatha Fernandes, *Curated Stories: The Uses and Misuses of Storytelling* (New York, NY: Oxford University Press, 2017) at 104-134. For details about how "imagery of the undocumented as law-abiding, hard-working, and family-oriented" had the effect of "simultaneously render[ing] more vulnerable the millions of immigrants who [did] not qualify" for "legalization" through a 2013 American immigration reform bill, see Angélica Cházaro, "Beyond Respectability: Dismantling the Harms of 'Illegality'" (2015) 52 Harv. J. on Legis 355.

[42] See *IRPR*, *supra* note 17 s 220.

[43] *Ibid* s 222.

[44] See, e.g. Ryan Hayes, "Neoliberal Citizenship: The Case of International and Non-Status Students in Canada," in Veronica P. Fynn, ed, *Documenting the Undocumented: Redefining Refugee Status, Center for Refugee Studies 2009 Annual Conference Proceedings* (Boca Raton, FL: Universal Publishers, 2009) 101 at 104, as cited in Villegas, P., *supra* note 13 at 11-12; Alex Usher, "Canadian universities have become addicted to the revenues brought in by international students. but how much should they subsidize our institutions?" Policy Options (29 August 2018) online: <https://policyoptions.irpp.org/magazines/august-2018/canadas-growing-reliance-on-international-students/> [Usher]; Tim Anderson, "News Media Representations of International and Refugee Postsecondary Students" (2020) 91:1 Journal of Higher Education 58; Nicholas Hune-Brown & Cornelia Li, "The Shadowy Business of International Education" in The Walrus (18 August 2021), online: <https://thewalrus.ca/the-shadowy-business-of-international-education/>.

Three Barriers to Postsecondary Education for PLS Students

Barrier 1: Study Permits

The first of the three key barriers that PLS students face in seeking postsecondary education in Canada regards their access to study permits. Although citizens and PRs are automatically entitled to study at colleges or univerisities in Canada, the *Immigration and Refugee Protection Regulations* ("*IRPR*") stipulate that foreign nationals "may not study in Canada unless authorized to do so by the Act, a study permit or these Regulations."[45]

Some PLS students are able to apply for study permits from within Canada, including H&C Applicants who have been approved in principle,[46] refugee claimants[47] and spouses or dependent family members of Canadian citizens, PRs or TFWs who have valid work permits.[48] However, students who are entirely undocumented, H&C applicants, refused refugee claimants and spouses or dependent family members of TFWs who have fallen out of status cannot apply for study permits from within Canada.[49] Many of these categories of migrants would also have difficulty applying from outside Canada because they would be unable to obtain visas to return to Canada or because they face persecution or other dangers in their countries of origin. As such, the inability to apply for study permits from within Canada effectively bars these PLS students from obtaining study permits.[50]

If PLS students cannot obtain study permits, they face several barriers in registering at colleges and universities. First, while some colleges or universities will allow PLS students to register without showing that they have a study permit, such policies have been described as "uneven", and it is often difficult for would-be applicants to find clear information on the subject.[51] In addition, even where a college or university is prepared to admit PLS students without study permits, those students may be reluctant to apply in the first place due to institutional practices. For example, most students applying to Ontario universities must submit an online form through the Ontario

[45] *IRPR*, *supra* note 17 s 212.

[46] *IRPA*, *supra* note 17; Canada, Immigration, Refugees and Citizenship Canada, "Study Permits: Refugees and Protected Persons" (2014) online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/study-permits/making-application.html#InCanada> accessed November 22, 2020 [IRCC, Study Permits]; *ibid* at s 207(d).

[47] IRCC, Study Permits, *ibid*.

[48] Provided that their status is valid at the time that they submit their application. Meghan Wilson, *Access to postsecondary education for undocumented immigrants* (Toronto, Parkdale Community Legal Services, Unpublished: 2009) at 15 [Wilson].

[49] *Ibid*. Additionally, students over the age of 22 could "age out" of an opportunity to apply for a study permit as a dependent. See generally Canada, Immigration, Refugees and Citizenship Canada, "Who you can include as a dependent child on an immigration application" (2020) online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/age-limit-requirements-dependent-children.html> accessed July 28, 2020.

[50] Assuming that they are from a "visa-required" country. See Canada, Immigration, Refugees and Citizenship Canada, "Temporary residents: Eligibility and admissibility considerations" (2019) online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/visitors/eligibility-admissibility-considerations.html> accessed March 28, 2020; Canada, Immigration, Refugees and Citizenship Canada, *Find out if you need a visa to travel to Canada* (2020) online: <https://www.cic.gc.ca/english/visit/visas.asp> accessed March 28, 2020.

[51] Armanyous & Hudson, *supra* note 15 at 11; Villegas, P., *supra* note 13 at 249-250.

Universities' Application Centre ("OUAC") which requires them to disclose their immigration status.[52] OUAC will reportedly process applications regardless of a lack of status, but PLS students who do not possess study permits may avoid applying due to their anxiety about disclosing their immigration status.[53]

Barrier 2: International Student's Tuition Fees

This brings us to the next barrier that many PLS students face: prohibitively expensive tuition fees. The difference in the cost of postsecondary education for domestic and international students is dramatic. For example, in 2021-2022, the average annual undergraduate tuition for international students in Canada was $33,623, nearly five times greater than the average cost of domestic tuition fees.[54]

Many PLS students are designated as "International Students" pursuant to provincial legislation despite having called Canada "home" for many years. This is problematic because in response to decreased government funding for international students in the late 1990s[55] international students' tuition fees have increased, becoming a significant and rising source of revenue for colleges and universities across Canada.[56]

In Ontario, the Ministry of Colleges and Universities decides who qualifies as a domestic or international student. They have chosen to base this qualification on a definition of "international student" drawn from federal immigration legislation, rather than on actual residence.[57] As a result, protected persons,[58] H&C applicants who have been approved in principle[59] and spouses or

[52] The OUAC website requires applicants to provide information regarding status in Canada and country of citizenship and requests that applicants upload proof of status in Canada, though it notes that these documents "are not mandatory". Ontario Universities' Application Centre, "101 – Personal Information", online: <https://www.ouac.on.ca/guide/101-personal-information/>.

[53] Wilson, *supra* note 48 at 19-20; Armanyous & Hudson, *supra* note 15 at 9.

[54] Statistics Canada, *Tuition fees for degree programs, 2021/2022*, The Daily, (Ottawa: Statistics Canada, 2021) <https://www150.statcan.gc.ca/n1/daily-quotidien/210908/dq210908a-eng.htm> accessed August 6, 2022 [Statistics Canada].

[55] Ontario, Ministry of Training, Colleges and Universities, *Ontario Operating Funds Distribution Manual: Manual Governing the Distribution of Ontario Government Operating Grants to Ontario Universities and University-Related Institutions (Formula Manual)* (Toronto: Ministry of Training, Colleges and Universities, 2009) <https://silo.tips/download/the-ontario-operating-funds-distribution-manual > accessed March 28, 2020 at 5.1.4 [MTCU, *Distribution Manual*].

[56] A 2018 report noted that international student fees made up 12% of operating revenue and 35% of all fees collected by institutions, that these "proportions continue to climb" and that international students' tuition fees "have risen at twice the rate of hikes in domestic students' tuition fees." See Usher, *supra* note 44.

[57] Ontario, Ministry of Training, Colleges and Universities, *Tuition and Ancillary Fees Reporting* (Toronto: Ministry of Training, Colleges and Universities, 2003) <http://www.tcu.gov.on.ca/pepg/documents/TuitionandAncillaryFeesReporting2012.pdf > accessed August 8, 2022 at 22-26 [MTCU, *Tuition*].

[58] Refugee students have, however, "reported being commonly mistaken for international students by postsecondary institutions". Jaswant Kaur Bajwa et al, "Refugees, Higher Education, and Informational Barriers" (2017) 33:2 *Refuge* 56 at 60.

[59] Provided that they have are able to provide evidence of their approval in principle to the school and that this is accepted.

dependent family members of Canadian citizens, PRs or TFWs[60] qualify for domestic fees.[61] However, refugee claimants,[62] H&C applicants and entirely undocumented students are required to pay international fees.[63] This policy ignores the fact that many of these students have considered Canada home for most of their young lives and have completed primary and secondary school in Canada. This policy also creates a significant barrier to postsecondary education for these students, many of whom are in precarious financial positions to begin with.[64]

Barrier 3: Financial Aid

The financial inaccessibility of post-secondary education is further compounded by most PLS students' ineligibility for provincial student loans, which are the "form of student credit […] most accessible to students from low and middle-income families".[65] Student loans are governed by the *Canada Student Financial Assistance Act* ("*CSFA*") and provincial student assistance programs tend to mirror the criteria provided in that federal Act.[66] According to the *CSFA*, only citizens, PRs and protected persons are "qualifying students" for the purposes of student loans.[67] As a result, H&C applicants (including those approved in principle), refugee claimants, refused refugee claimants, entirely undocumented students and spouses or dependent family members of Canadian citizens, PRs or TFWs are all ineligible for provincial programs such as the Ontario Student Assistance Program ("OSAP").[68]

The impact of non-eligibility for financial assistance poses particular problems for PLS youth who also face significant barriers in the labour market. If they enter the workforce without legal authorization, they face heightened vulnerability because "just as surely as undocumented children are disadvantaged relative to other children, so are undocumented adults disadvantaged relative to other adults."[69] Precarious legal status in Canada "results not only in differential access to legal protections, but also in deskilling, job insecurity and decreased labour mobility."[70] Many PLS migrants are "subject to exploitation by employers, often in physically demanding labour

[60] Students are not exempted from international student fees if they cannot present a family member's work permit that names a "specific Canadian employer situated in Ontario". MTCU, *Tuition*, *supra* note 57 at 24.
[61] Although these students may be entitled to pay domestic fees in theory, this may not occur in practice due to the "severe misunderstandings and misinformation" that continue to surround these exceptions. Aberman, *supra* note 13 at 6.
[62] See Meloni, *supra* note 13 at 476.
[63] Foreign nationals are not included in the "Categories of individuals exempt from international student tuition fees" in the MTCU, *Tuition*, *supra* note 57, at 22-26.
[64] For a discussion of students' employment and financial stressors, see Kamal & Killian, *supra* note 5 at 65; Paloma E. Villegas, "Temporalising barriers: Postsecondary schooling access among precarious status students in Toronto" (2021) 27:5 Population, Space & Place 1.
[65] For details about how government student loans are distributed in Canada, see Stephanie Ben-Ishai, "Government Student Loans, Government Debts and Bankruptcy: A Comparative Study" (2006) 44:2 Can Community LJ 211 at 215-219 [Ben-Ishai].
[66] Wilson, *supra* note 48 at 25.
[67] *Canada Student Financial Assistance Act*, S.C. 1994, c. 28, s 2(1) [*CSFA*]. Note that protected persons have been eligible for provincial financial aid since 2003. See Louise Slobodian and Harry J. Kits, *Student Loans for Refugees: A Success Story for Policy Change* (December 2003) The Caledon Institute of Social Policy, online at: <https://maytree.com/publications/student-loans-for-refugees-a-success-story-in-policy-change/> [Slobodian & Kits].
[68] Only citizens, PRs and protected persons are "qualifying students" in section 2(1) of the *CSFA*.
[69] Michael A. Olivas, "Plyler v Doe, Toll v Moreno, and Postsecondary Admissions: Undocumented Adults and Enduring Disability", (1986) 15:19 J.L. & Educ. 28 at 28-29.
[70] Marsden, *Silence*, *supra* note 26, at 33.

positions"; they "rarely have any guarantee of continual work, and often work informally, filling very short-term, transient positions, with little assurance of rehire the next day".[71] These realities have resulted in "a sense of general malaise" in PLS youth, who, once compelled to work in the informal labour market, begin to "feel there is no upward mobility because of a lack of status," truncating their development and negatively affecting their mental health.[72]

When ineligibility for financial assistance is combined with barriers in the labour market, the result is that unless a student is independently wealthy, is able to obtain a substantial private loan (which Canadian banks would be unlikely to provide due to immigration status) or is able to access sufficient private scholarships or bursaries[73] to cover a tuition of around $33,623 per year, PLS youth typically cannot afford to attend college or university.[74]

Taken together, these three barriers make it impossible for many PLS youth to pursue postsecondary education.

Access to Education at the Primary and Secondary Level

The situation facing PLS youth once they turn 18 can be contrasted with the situation facing PLS students under the age of 18. With respect to primary and secondary education, after years of persistent activism by migrant justice organizations, such as the "Don't Ask, Don't Tell Coalition," "No One is Illegal" and the "Education Rights Task Force", some provincial and municipal legislation and some school board policies have been revised to provide greater access to secondary education.[75]

In Ontario, for example, section 49.1 to the Ontario *Education Act* now reads as follows: "A person who is otherwise entitled to be admitted to a school and who is less than eighteen years of age shall not be refused admission because the person or the person's parent or guardian is unlawfully in Canada."[76] Activists have also long pressed governments and school boards to give effect to this legislative provision through petitions and protests.[77] Official Ministry of Education policy now clarifies that this provision means that schools must avoid excluding students because their parents cannot provide various documentation (e.g., immigration documents, social insurance numbers, health documentation, etc.) to ensure that "where the child is otherwise entitled to be admitted to a

[71] Jackson & Bauder, *supra* note 30 at 377.
[72] Kamal & Killian, *supra* note 5 at 65.
[73] Unfortunately, high performing PLS students who could otherwise secure scholarships or prizes based on their academic performance are frequently ineligible for these scholarships or prizes due to their legal status, making high tuition an even more significant barrier.
[74] Wilson, *supra* note 48 at 25-26; Statistics Canada, *supra* note 54.
[75] For details about these groups see Francisco Javier Villegas, "The Politics of 'Access': Undocumented Students and Enrollment in Toronto Schools" (Toronto, University of Toronto, Unpublished: 2014). See also Patricia Landolt & Luin Goldring, "Assembling Noncitizen Access to Education in a Sanctuary City: The Place of Public School Administrator Bordering Practices" in Xóchitl Bada and Shannon Gleeson (eds), *Accountability Across Borders: Migrant Rights in North America* (Austin, U Texas P: 2019).
[76] Philip Cheshing Kuligowski Chan, *'Sanctuary Toronto': Municipal Authority, Policing Cities, and Residents with Precarious Immigration Status* (Toronto, University of Toronto, Unpublished Master's thesis: 2018) at 44-45 [Chan]; *Education Act* RSO 1990, c E.2.
[77] See e.g., Ontario, Legislative Assembly of Ontario, Official Report of Debates (Hansard), 37th Parl, 3rd Sess, No 20A (13 June 2002) at 963 (Hon G Kennedy) (noting protests and petitions on this issue).

school, the fact that the child or the child's parents are unlawfully in Canada should not be a barrier to the child's admission."[78] Under pressure from advocates, some school boards in Ontario have also adopted formal policies to welcome students regardless of immigration status.[79]

Whereas Ontario's legislation ensures that, in principle, all youth are entitled to attend school regardless of their or their parent/guardian's immigration status, the legislation in some other provinces bases eligibility on "ordinary residence" in the province instead.[80] In Quebec, for example, after years of advocacy,[81] Bill 144 now guarantees that any child whose legal guardian "ordinarily resides in Quebec" has the right to free schooling until the end of the school year in which the student turns 18.[82] Despite this encouraging change, activists continue to express concern "that some families don't have access to the forms of proof normally required by school boards" and about "whether school boards will show sufficient flexibility in this regard."[83]

The *British Columbia School Act* similarly provides education for all minor "residents" in British Columbia ("BC") free of charge if they or their guardians are "ordinarily resident" in BC, with the Ministry of Education indicating that "Immigration status is relevant but not determinative of ordinary residence."[84] Grassroots organizations such as the Sanctuary Health Collective[85] have worked with BC school boards on a case-by-case basis to try to ensure equal access to education for PLS children.[86] Since this work began over six years ago, at least one school district in BC (New

[78] Ontario, "Policy/Program Memorandum 136: Clarification of section 49.1 of the Education Act: education of persons unlawfully in Canada" Ministry of Education (2004) online: <https://www.ontario.ca/document/education-ontario-policy-and-program-direction/policyprogram-memorandum-136#section-0>.

[79] See e.g. Toronto District School Board, "Policy P061 - Students Without Legal Immigration Status" (16 May 2007) online: <https://www.tdsb.on.ca/About-Us/Detail/docId/1555>. For a discussion about the role of activists in pushing for this policy, and for a discussion about some of the limits of pursuing change through such policies, see: Francisco J. Villegas, "'Don't ask, don't tell': examining the illegalization of undocumented students in Toronto, Canada" (2018) 39:8 British Journal of Sociology of Education 1111.

[80] Chan, *supra* note 76 at 44-45.

[81] As in Ontario, activists played a key role in pursing this policy for many years. See e.g. Darya Marchenkova, "School now free for all Quebec children, no matter immigration status", *Montreal Gazette* (2018) online: <https://montrealgazette.com/news/local-news/school-now-free-for-all-quebec-children-no-matter-immigration-status>; Québec, Assemblée Nationale, Journal des debates de la Commission permanente de la culture to de l'éducation, 41 Legislature, 1st Sess, Vol 44, No 72 (5 September 2017) at 41

[82] Bill 144, An Act to amend the Education Act and other legislative provisions concerning mainly free educational services and compulsory school attendance, Quebec, 2017.

[83] Collectif Education Sans Frontières, "The exclusion of children with precarious immigration status from school and the new law 144" 20 August 2017, online: <http://collectifeducation.org/en/conference-de-presse-sur-lexclusion-denfants-a-statut-dimmigration-precaire-de-lecole-et-implementation-de-la-nouvelle-loi-144/>.

[84] Sarah Marsden, *Enforcing exclusion: precarious migrants and the law in Canada* (Vancouver: UBC Press, 2018) at 109-11 [Marsden, *Enforcing exclusion*]; British Columbia, Ministry of Education, *Eligibility of Students for Operating Grant Funding* (Vancouver: Ministry of Education, 2011) <https://www2.gov.bc.ca/gov/content/education-training/k-12/administration/legislation-policy/public-schools/eligibility-of-students-for-operating-grant-funding> accessed March 28, 2020.

[85] The Sanctuary Health Collective is a grassroots community group that advocates for services for all regardless of their immigration status. For more information on the work done by this group, see Sanctuary Health Collective, "Sanctuary City Vancouver: About" (n.d.) online: <http://www.sanctuarycityvan.com/?fbclid=IwAR3483z4TbKzfVgp_tdp0vYkCjJ9u1jg0-DLMvdnIJc0SpoQ8seJ1k2GNTI>.

[86] New Westminster Schools, "First in BC – School Board Adopts Sanctuary Schools Policy" (2017) online: <https://newwestschools.ca/first-in-bc-school-board-adopts-sanctuary-schools-policy/>.

Westminster) has adopted a 'Sanctuary Schools' policy[87] which provides that "families who […] meet the provincial definition of 'ordinarily resident' in New Westminster can access school without fear that their information will be shared with federal immigration authorities, unless there is a specific case where it may be required to do so by law."[88]

In practice, whether due to challenges connected with demonstrating ordinary residence or due to problems with local school administrators failing to follow provincial rules, many PLS children continue to struggle to access primary and secondary education in each of these provinces.[89] Notwithstanding those struggles, it remains the case that many PLS students are, in principle, entitled to attend primary and secondary education without paying fees.

It is somewhat puzzling that provinces have invested in primary and secondary education of PLS children but, at least to date, have declined to do so at the post secondary level. As Meghan Wilson puts it:

> After financially investing in undocumented students' education from kindergarten to grade twelve, the government then denies academically qualified students the opportunity to continue their education. This is inconsistent with the government's own policy of not conflating immigration status with students' right to education. It makes better sense for the province to educate its residents so they can contribute to the economy and society to the[ir] fullest potential.[90]

Nonetheless, it is currently the case that, while, in principle PLS youth can access primary and secondary education in many provinces, most are prevented from accessing post-secondary education.

York University's Access Program

York University's Access Program began as a community project responding to the problem that Ontario's legislation applied only to primary and secondary education, leaving PLS students who completed high school "with extremely limited possibilities for continuing onto postsecondary education."[91]

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[87] For more information on the policy, see New Westminster Schools, "Our Sanctuary Schools Policy" (n.d.) online: <https://newwestschools.ca/wp-content/uploads/2021/04/3170_NWS_PolicyPostcard_FINAL.pdf> [*New Westminster Schools*].

[88] *Ibid*.

[89] Although access to primary and secondary school is beyond the scope of this paper, we note that admission practices of school boards across the country can be very restrictive. One co-author, Francisco Rico Martinez, regularly struggled to assist students on multiple-entry visas with accessing schooling in his role as Co-Director of the FCJ Refugee Centre – both the Toronto District School Board and the Toronto Catholic School Board prohibit their admission. See e.g., Toronto District School Board, Admission Eligibility Requirements Operational Procedure PR518. (Toronto: Toronto District School Board, 28 January 2020) online: <http://ppf.tdsb.on.ca/uploads/files/live/98/1635.pdf> at Appendix D. For a discussion of further barriers for PLS youth in primary and secondary school see Aberman, *supra* note 13 at 5; Marsden, *Enforcing exclusion*, *supra* note 84 at 117-118; Villegas, F., *supra* note 13 at 1112.

[90] Wilson, *supra* note 48 at 37. This paper has been heavily relied upon by many who have proposed other access programs in Ontario. See, e.g., Aberman, *supra* note 13 and Dayana A. Gonzalez Mateus, *Expanding Access to Postsecondary Education for Youth with Precarious Legal Status: A Ryerson University Case-Study* (Toronto, Major Research Paper presented to Ryerson University, unpublished: 2017) at iii and 11 [Mateus].

[91] Villegas & Aberman, *supra* note 6 at 77; Aberman, *supra* note 13 at 5.

In the early 2010s, migrant activist organizations like the FCJ Refugee Centre experimented with "community-based strategies" to assist PLS students.[92] This included developing an "Uprooted University", where members of the FCJ Youth Network learned from university educators about a variety of topics in a community center classroom.[93]

York University's involvement began with efforts to ensure that one PLS student could pay domestic fees and grew as the Centre for Refugee Studies ("CRS") developed a scholarship specifically geared towards refugee and PLS students.[94] Following the 2015 Pan Am/Parapan Games, the City of Toronto issued an invitation for proposals for a grant to be awarded to initiatives that aim "to improve equity, access and human rights" for members of Toronto's Latin American, South American and Caribbean communities.[95] Together, the FCJ Refugee Centre, York University's Vice Provost Academic's Office and Centre for Research on Latin America and the Caribbean co-developed a successful proposal to use the grant to increase access to post-secondary education for PLS youth in Toronto from these communities.

The Access Program was inaugurated in January of 2017, resulting in headlines proclaiming York University as the "First Canadian University to Give 'Dreamers' a Chance at a Degree."[96] The program was based on other programs designed to provide access to a postsecondary education for marginalized people, and it ultimately created two pathways to York University for PLS students: a "direct-entry" path for students prepared to begin an undergraduate degree, and a "bridging course" housed in York's department of Sociology for students who felt "they needed further preparation or additional support".[97]

The Access Program was developed to respond directly to all three of the barriers faced by PLS youth outlined above.

With respect to the first barrier, obtaining a study permit, York University admits PLS students to the program whether or not they possess study permits.[98] Similarly, York University has chosen to "bypass" the obstacles presented by the OUAC system, described above, for students who have not graduated from Ontario high schools by allowing them to apply directly to the university using a mechanism that had primarily been used by mature students, returning students or students with

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[92] FCJ Youth Network, *Youth to You*, *supra* note 12 at 60; Villegas & Aberman, *supra* note 6 at 77.

[93] This program was modeled after similar "Freedom University" initiatives in the US. Villegas, P., *supra* note 13 at 251.

[94] Aberman, *supra* note 13 at 18. Many involved with the CRS contributed to this project, including the long-serving CRS Coordinator, Michele Millard.

[95] *Ibid* at 19; Armanyous & Hudson, *supra* note 15 at 11.

[96] Villegas & Aberman, *supra* note 6 at 77; Mary Weims, "York First Canadian University to Give 'Dreamers' a Chance at a Degree," *CBC News*(15 January 2018) online: <http://www.cbc.ca/news/canada/toronto/canadian-dreamers-york-university-1.4488252.>.

[97] Villegas & Aberman, *supra* note 6 at 77. The program was "meant to encourage the continuing development of students' critical, writing, and oral presentation skills" and "attempted to introduce students to university policies […] and the types of resources […] available at the university." For reflections from the bridging course's first instructor about how PLS students "pushed the boundaries of who is expected and welcome in university settings", see Villegas, P., *supra* note 13 at 246 and 253-256.

[98] Aberman, *supra* note 13 at 15. We discuss the legality of admitting students without study permits in detail below, at Part 2.

disabilities.[99] Although this process does require students to indicate their country of citizenship and their status in Canada (which was acknowledged as "problematic and potentially anxiety producing"), it was determined to be more "conducive to accepting students based on residency instead of status".[100] Administrators felt that this process and the use of the "precarious legal status student" umbrella was better for students than applying through OUAC because it ensured that only one university official would have knowledge of each student's immigration status. Although students have found it stressful to disclose their immigration status, Tanya Aberman, who previously acted as the FCJ Refugee Centre's research and project coordinator and who has coordinated York University's Access Program since 2018, has been actively engaged in supporting students before, during and after they submitted their applications. With this support, many PLS students' desire to apply has appeared to outweigh their apprehension at disclosing their status.[101]

The Access Program also directly addresses the barrier posed by international fees. In addition to providing the first semester of the bridging course free of charge, York University charges PLS students domestic tuition fees rather than international tuition fees, despite the way that they are categorized by the MTCU.[102]

Unsurprisingly, loss of revenue was a major concern for university administrators.[103] Universities are largely funded by a combination of tuition and MTCU grants, with the latter distributed based on the number of students reported in a series of enrolment reports. Because these reports only count citizens, PRs and migrants approved in principle for PR, postsecondary schools could suffer a loss of approximately 66% on each PLS student relative to other non-international students.[104]

These concerns were addressed internally at York University, where administrators demonstrated leadership in ensuring PLS student access to the university, by highlighting (1) that "case-by-case exceptions" and "exceptions for other marginalized populations" were common practice, (2) that attending the university as an international student was impossible for most PLS youth and that the school therefore faced a choice between having students "in University as domestic-fee paying students" or "not having them attend at all" and (3) that the University could capitalize on "the current trend of decreased enrolment in order to fill seats", as filling out classes that were running below capacity "would not create a loss" but would instead represent a gain for the university "from the domestic fees (even if they lose the subsidy) if these students are filling spaces for which no one else had applied".[105]

Finally, because York University recognized that students were not eligible for OSAP or for other bursaries, the CRS worked with the York University Faculty Association to support PLS students through a targeted bursary.[106] Although the $1,500 which the bursary currently offers for the year is only available to a handful of students and is significantly less than what students with secure

[99] *Ibid* at 15, 18.
[100] *Ibid* at 16.
[101] *Ibid* at 15-16.
[102] Armanyous & Hudson, *supra* note 15 at 11.
[103] Aberman, *supra* note 13 at 17.
[104] MTCU, *Distribution Manual*, *supra* note 55, at 4; *Ibid* at 15.
[105] Aberman, *supra* note 13 at 15-18.
[106] Centre for Refugee Studies, "CRS Scholarships and Bursaries", (online) <https://crs.info.yorku.ca/crs-scholarships-and-bursaries>

status receive through OSAP and federal funding,[107] "at the very least—these are tangible efforts made towards reducing the barriers currently in place against undocumented immigrants who wish to access Canadian postsecondary education."[108] It is clear that finances remain a major barrier to education for PLS students – internal reports highlight that "[m]any of the students who successfully complete the bridging course struggle to transition directly to undergraduate degree programs for financial reasons".[109] Several students had to temporarily drop out to save money, while others started their degrees as part-time students to allow them to work.[110] Other colleges and universities considering adopting their own Access Programs will need to carefully consider additional strategies to lessen these financial barriers.

York University's Access Program is, admittedly, only one step towards responding to the educational aspirations of PLS youth. The program is small. It is not widely advertised. The financial supports provided to students are inadequate. Moreover, there are ongoing concerns about sufficient and stable long-term funding and support needed to make the program sustainable.

Nonetheless, York University's Access Program has helped many PLS students. In the 2019/2020 school year there were 70 students admitted through this program studying in undergraduate programs in six faculties, and a total of 94 enrolled in the bridging course.[111]

York University's Access Program has generated substantial interest amongst scholars and has already been cited by those hoping to create similar programs at Toronto Metropolitan University and at the University of Toronto.[112] This demonstrates that York University's successes can be used "as a framework to establish similar policies" in other institutions.[113]

Part 2: Do Colleges and Universities Face Legal Impediments to Admitting PLS Students?

The Relevant Provisions

Post-secondary institutions that are considering admitting PLS students may understandably be worried about whether they are legally prevented from doing so.

There are a variety of legal issues that arise in this context. For example, there are real concerns about privacy and the security of data about PLS students held by post-secondary institutions, including concerns related to the Freedom of Information and Protection of Privacy Act.[114] There

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[107] Ontario, Ministry of Training, Colleges and Universities, *Student loans, grants, scholarships and bursaries: Maximum amounts of aid* (Toronto: Ministry of Training, Colleges and Universities, 2019) <https://www.ontario.ca/page/maximum-amounts-aid> accessed March 28, 2020.
[108] Armanyous & Hudson, *supra* note 15 at 11-12.
[109] Tanya Aberman, "Report on Access Program for Precarious Status Students" FCJ Refugee Centre (2018) at 5.
[110] *Ibid.*
[111] Correspondence with Office of the Vice-Provost Academic at York University, August 20, 2020, on file with author. For details about why many students who enrolled in the bridging course were unable to complete it, see *Ibid* at 4.
[112] The Working Group on Access to Higher Education for Students with Precarious Immigration Status reportedly presented a proposal for a pilot program to be established at the U of T in 2018. Armanyous & Hudson, *supra* note 15 at 12.
[113] *Ibid* at 12-13.
[114] See *Ontario's Freedom of Information and Protection Privacy* Act, RSO 1990, c F.31 [*FIPPA*]; *Wilson, supra* note 48 at 20-1.

may also be concerns about matters within provincial jurisdiction, including provincial funding and reporting arrangements.[115]

In our view, however, the most challenging potential legal impediment that colleges and universities face to admitting PLS students is the *IRPA*'s catch-all and counselling provisions. Theoretically, these provisions could be applied to colleges or universities admitting PLS students who are not in possession of study permits.

Section 131 of the *IRPA*, which we will refer to as the counselling provision, states that "Every person who knowingly induces, aids or abets or attempts to induce, aid or abet any person to contravene section […] 124 […], or who counsels a person to do so, commits an offence and is liable to the same penalty as that person".[116] Section 124(1)(a), which we will refer to as the catch-all provision, states that "Every person commits an offence who contravenes a provision of this *Act* for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this *Act*".[117] The penalties for violations of these provisions could include, on conviction on indictment, either one or both of "a fine of not more than $50,000" or imprisonment of up to two years, or, on summary conviction, one or both of a "fine of not more than $10,000" or imprisonment up to six months."[118]

Taken together, these provisions may cause colleges and universities to fear that by admitting PLS students who do not possess study permits, they or their employees may be liable to the sanctions outlined above for "counselling", "induc[ing], aid[ing] or abet[ting]" a student "to contravene" s. 30 of the *IRPA*, which states that foreign nationals "may not […] study in Canada unless authorized to do so".[119]

These provisions are extremely broad. So broad, in fact, that they were recently subject to a constitutional challenge (*R v Boule*) which alleged that they were overbroad, arbitrary and vague in contravention of s. 7 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*").[120] Although the British Columbia Supreme Court ("BCSC") acknowledged the catch-all provision's breadth, they found criminal prosecutions pursuant to the catch-all provision to be constitutional nonetheless, concluding that "a broad definition is not a vague definition."[121]

Boule did not specifically consider whether the act of admitting PLS students to study in a college or a university could potentially fall within the purview of these provisions, but it certainly raises the possibility and therefore warrants our consideration.

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[115] As discussed above, loss of revenue was a concern for York University administrators as universities are largely funded by a combination of tuition and MTCU grants, with the latter distributed based on the number of citizens, PRs and migrants approved in principle for PR reported. See discussion in Aberman, *supra* note 13 at 15; MTCU, *Distribution Manual*, *supra* note 55.
[116] *IRPA*, *supra* note 17 s 130.
[117] *Ibid* s 124(1)(a).
[118] *Ibid* s 125.
[119] A penalty is not specifically provided in this provision. *Ibid* s 30.
[120] *R v Boule*, Canada, X081450 (BCSC) (Memorandum of Fact and Law of the Applicants) [*R v Boule*, Applicant's Memo]. See *R v Boule*, 2020 BCSC 1846 [*Boule*].
[121] *Boule*, *ibid* at para 89, 143 and 160-165.

Background

In order to better understand the risk, it is important to place the *Boule* decision in a broader context. *Boule* is the latest in a series of decisions following the SCC's decision in *R v Appulonappa* which arose in October of 2009 when a ship carrying Tamil asylum seekers from Sri Lanka, the MV Ocean Lady, was intercepted off the coast of Vancouver Island. Most of the passengers had agreed to pay between $30,000 and $40,000 to come to Canada.[122] Of the 76 asylum seekers on board who all reportedly "performed various jobs in the spirit of working towards the common goal of getting to Canada", four passengers were singled out and charged pursuant to s. 117(1) of the *IRPA*, which made it an offence to "organize, induce, aid or abet" the coming into Canada of people "who are not in possession of a visa, passport or other document" as required by the *IRPA.*[123] The Crown accused these four men of organizing the trip and of having other "significant responsibilities" on the ship, such as acting as the ship's captain, chief engineer and engine room worker.[124]

The SCC ultimately concluded that s. 117 of the *IRPA* violated s. 7 of the *Charter*.[125] They found that despite the breadth of s. 117, its purpose was narrow: to combat people smuggling.[126] The court concluded that s. 117 was unconstitutionally overbroad because "nothing in the provision actually enacted disallow[ed]" the conviction of those providing mutual or humanitarian assistance to asylum-seekers.[127] Accordingly, the SCC ordered that the provision be "read down […] as not applicable to persons who give humanitarian, mutual or family assisstance."[128]

Although *Boule* reiterated the SCC's finding with respect to the overbreadth of the present s. 117,[129] the court made the opposite finding with respect to the catch-all provision.

It is difficult to know what impact this decision will have on the question at hand, as the facts of *Boule* are far from analogous to a university choosing to educate students with precarious legal status. *Boule* concerned the owner of an Inn on the American side of the American-Canadian Border who allegedly collected payment from refugees who arrived to stay at his Inn, and subsequently gave them information on the location of the Canadian border and roads that lie beside his property.[130] Boule was charged with two counts under s. 117 of the *IRPA*, seven counts under s. 124(1)(a) or s. 131 of *IRPA* and twelve counts of breach of bail under s. 145(3) of the *Criminal Code*.[131]

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[122] *R v Appulonappa,* 2015 SCC 59 at paras 1-2 [*Appulonappa, 2015*].
[123] *R v Appulonappa*, 2017 BCSC 1316 (CanLII) at para 4-9 [*Appulonappa, 2017*]; David Moffette and Nevena Aksin, "Fighting Human Smuggling or Criminalizing Refugees? Regimes of Justification in and around *R v Appulonappa*" (2018) 33:1 Canadian Journal of Law and Society 21 at 28 [Moffette & Aksin].
[124] In a subsequent criminal trial, Justice Silverman concluded that "all of the conduct performed by the four accused was performed in pursuit of that mutual goal [of getting themselves to Canada] and amounts solely to mutual aid." *Appulonappa, 2017, supra* note 123 at para 7 and 286.
[125] *Appulonappa, 2015, supra* note 122 at para 34 and 72.
[126] *Ibid* at para 34 and 74.
[127] *Ibid* at para 74-77.
[128] This remedy was subsequently re-interpreted by the BCCA in 2019; the court concluded that *Appulonappa* "created true defences to a charge of human smuggling under s. 117 of the *IRPA*". The BCCA set out four elements to a new "humanitarian aid defence". See *Appulonappa, 2015, supra* note 122 at para 85; *R v Rajaratnam,* 2019 BCCA 209 (CanLII) at paras 173 and 208 [*Rajaratnam*].
[129] *Boule, supra* note 120 at para 165.
[130] *R v Boule*, Applicant's Memo, *supra* note 120 at para 17.
[131] *Ibid* at para 21.

Whereas in *Appulonappa* the SCC found that s. 117 was unconstitutional because it exceeded its narrow purpose of combatting human smuggling, in *Boule* the BCSC found that the catch-all provision was constitutional because all prosecutions under this provision could be related to its broad purpose, which the court defined as follows:

> to maintain the integrity of the Canada's immigration and refugee protection regime by providing a criminal enforcement option for contraventions of the statute or conditions or obligations imposed under it. The availability of criminal enforcement prevents abuse of the immigration system and protects the safety, security and health of Canadian society.[132]

We disagree with the BCSC that the provision's purpose is this broad. Although the catch-all provisions were debated very little prior to the enactment of the *IRPA,*[133] the debates leading up to the adoption of Bill C-84, which amended the *Immigration Act of 1976* in 1988, shed more light on parliament's intention behind these broad provisions.[134] During these debates, Mary Collins, a Progressive Conservative Member of Parliament, explained that she wanted to impose "greater penalties for those who organize and abet those persons coming into Canada without documents", such as "unscrupulous immigration counsellors and people like that inducing, abetting, or organizing persons to come in and make manifestly unfounded or frivolous claims; basically counselling them to lie."[135] Benoît Bouchard, the former Minister of Employment and Immigration, responded that Collins could find the answer to her concerns in s. 95(m), the forerunner to the catch-all provisions in the *Immigration Act of 1976.*[136]

Similar to the debates highlighted in *Appulonappa*, these debates reveal a concern about unintentionally capturing individuals providing humanitarian assistance. In this same meeting, the drafters discussed the broader controversy of whether the proposed amendments "opened up the door to the prosecution of church groups, of humanitarian groups, if they assist refugees."[137] Bouchard explicitly rejected this notion, saying that although such groups had technically "been liable to prosecution" under previous acts, "the administration of this act has always recognized, and will continue to recognize, the humanitarian nature of these activities."[138] In Bouchard's view, courts interpreting the bill would be guided by the bill's clearly stated dual purposes "to control widespread abuse" and "to deter [...] smuggling".[139] In discussing the aiding and abetting provisions, Caplan agreed that the stated purpose should provide "even greater assurance […] that church persons would not be in contravention."[140]

These debates reveal a much narrower purpose for the catch-all provision: prosecuting those responsible for promoting fraud and illegal entry into Canada. Widespread abuse was certainly a

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[132] *Boule*, *supra* note 120 at para 97.
[133] House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 37-1, No 24 (15 May 2001) at 09:40, online: <https://perma.cc/R93V-PXZT>.
[134] Bill C-84, *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, 2d Sess., 33d Par., 1986-87, as passed by the House of Commons.
[135] *Ibid* at 28-35.
[136] *Ibid* at 30.
[137] *Ibid* at 15.
[138] *Ibid.*
[139] *Ibid* at 16.
[140] *Ibid* at 28.

concern, but this concern centered on entry into Canada. As the Applicant argued in *Boule*, Parliament did not intend for this provision to apply more broadly, they simply failed to recognize the fact that "subtle changes made to the provisions along with larger changes to the act as a whole, made the provisions drastically more expansive in its scope".[141]

Had the court accepted this narrower purpose, colleges or universities would have little to worry about, as admitting PLS students to colleges or universities has no relation to organizing persons coming into Canada or to encouraging fraud in the immigration system, it is more akin to "aid merely incidental to it", as the SCC describes in *Appulonappa*.[142]

Instead, *Boule* confirmed that although the counselling offence is unconstitutionally overbroad in its application to s. 117, it is not overbroad in its application to the catch-all provision.[143]

In coming to this conclusion, the BCSC considered several hypothetical contraventions of the *IRPA* which could lead to criminal prosecution. The court concluded that the following four situations could reasonably attract criminal prosecution:

(1) a permanent resident who breaches a residency obligation;
(2) a student who stops studying based on medical advice;
(3) a temporary resident whose application to extend their status is refused and does not leave; and
(4) a failed refugee claimant.[144]

The court's conclusion that a study permit holder studying could be criminally prosecuted under the catch-all provision for not actively pursuing her studies in contravention of s. 220.1(1) of the *IRPR* will undoubtedly be of particular concern to educators.[145] By the same logic, the student who studies without a study permit in contravention of s. 212 of the *IRPR* could also be criminally prosecuted under the catch-all provision.

What is less clear, however, is how likely it is that the school admitting that student could be prosecuted. By declaring the counseling provision constitutional as it applies to the catch-all provision, the court has declared that any person who attempted to or who knowingly induced, aided or abetted that student to study could, in theory, similarly be criminally prosecuted for that assistance.

Although *R v. Boule* discusses the rationale for the prosecution of foreign nationals in these scenarios in some detail (implying, in places, that prosecution is an option of last resort[146]), there is

[141] *R v Boule*, Applicant's Memo, *supra* note 120 at paras 88.
[142] *Appulonappa, 2015*, *supra* note 122 at para 63.
[143] *Boule*, *supra* note 120 at paras 84 and 137.
[144] *Ibid* at paras 113, 123, 127, 129 and 133.
[145] *Ibid* at paras 124-127.
[146] For example, in the context of a residency obligation breach, the court notes that prosecution of a PR who has breached their residency obligation is rationally connected to maintaining the integrity of the immigration system where the PR "has not complied with any of the available means to satisfy the residency obligation, has been unsuccessful on appeal and refuses to renounce their status". *Boule*, *supra* note 120 at para 123.

little discussion of the potential prosecution of those who have counselled, induced, aided or abetted those foreign nationals' actions pursuant to the counseling provision.

In these circumstances, in order to assess how realistic the danger of prosecution is, we must consider the practices of CBSA officers and Crown prosecutors, as well as the availability of any defences.

CBSA Past Practice

The catch-all and counselling provisions have been pursued fairly frequently but have rarely been litigated. According to CBSA documents, between 2006 and 2017 663 investigations pursuant to these provisions were opened, 441 charges were laid and 374 guilty convictions were obtained.[147] The case law that these charges have produced is of limited value for our purposes, as they relate to contexts quite different from admitting PLS students. Examples include charges against individuals who have counselled, induced, aided or abetted foreign nationals in returning to Canada without authorization following their removal from Canada,[148] in avoiding appearing for an examination upon entry into Canada[149] or in breaching a release order.[150] These practices appear to be in keeping with the purpose discussed above: prosecuting those responsible for promoting fraud and illegal entry into Canada.

We were unable to locate any examples of the catch-all provisions being used to sanction any individual or institution for assisting a student to study without a permit – though given the limited availability of pathways for PLS students to attend post-secondary institutions, that is perhaps not surprising. At a policy level, however, we found no mention of a desire to impose penalties on foreign nationals studying without study permits or on postsecondary institutions or their employees who educate them in our review of parliamentary debate discussing the catch-all provisions. In fact, government concern about immigration and postsecondary institutions appears to be focused on a very different perceived problem: foreign nationals who come to Canada as international students, but who work rather than study once they arrive.[151]

CBSA Enforcement Priorities

The fact that educators have not been sanctioned pursuant to the catch-all provisions is in keeping with instructions guiding the enforcement priorities of CBSA officers who are responsible for

[147] Immigration and Refugee Board, Access to Information and Privacy Request (ATIP), Doc A-2017-09644 [on file with author] at 71.
[148] In breach of s 52(1) of the *IRPA*, *supra* note 17. See, e.g., *R v Polnac*, 2017 BCSC 2408 (CanLII) at paras 34-40; *Suarez c R*, 2019 QCCA 649 (CanLII).
[149] In breach of s 18(1) of the *IRPA*, *supra* note 17. See, e.g., *R v Singh*, 2016 BCPC 407 (CanLII); *R v Cenolli*, 2015 ONSC 468 (CanLII).
[150] Many cases involved foreign nationals who committed a crime either inside or outside Canada, whose release orders stipulated that a breach of the release order would "constitute an offence pursuant to" s 124(1)(a) of the *IRPA*, *supra* note 17. See, e.g., *Harkat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 628 (CanLII) at 95; *Mahjoub (Re)*, 2011 FC 506 (CanLII) at 54.
[151] Canada, Immigration, Refugees and Citizenship Canada, "Designated Learning Institutions in Canada: Compliance Reporting" (2015) online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/study-canada/educational-institutions/compliance-reporting.html> accessed March 28, 2020.

"investigat[ing] and pursu[ing] the prosecution of persons who commit criminal offences in contravention of Canada's border-related legislation," including the *Customs Act* and the *IRPA.*[152]

Indeed, the Prosecution Policy set out in a CBSA Enforcement Manual indicates that "not every incident of non-compliance will merit a criminal investigation" and that criminal investigations will only be meritted where the offence is "of a complex or high-risk nature",[153] where "there is a strong public interest in investigating" the offence, where the offence demonstrates "an ongoing disregard for border legislation", where there is "internal intelligence available or leading to this investigation" or where the offence is "related to a larger pattern of criminality".[154] In our view, it is unlikely that colleges or universities admitting PLS students will be targetted according to these critiera.

Federal Prosecutors

If a college, university or educator were to be charged under the catch-all provisions nonetheless, Crown prosecutors would need to exercise their discretion to pursue a prosecution. It is certainly possible that this discretion could be used to pursue such charges, but this would be contrary to the guidance governing that discretion.

The Director of Public Prosecutions (the "DPP") is responsible for initiating and conducting prosecutions on behalf of the federal Crown.[155] The DPP then delegates this power and function to Crown prosecutors, who have "a duty of political neutrality" and who are guided by the Public Prosecution Service of Canada's (the "PPSC's") "Deskbook" in how to exercise their "significant discretion in the criminal justice system".[156]

In order to initiate and conduct a prosecution, Crown prosecutors are required by the Deskbook to answer "yes" to the following two questions: (1) "[i]s there a reasonable prospect of conviction based on evidence that is likely to be available at trial?" and (2) "[i]f there is, [w]ould a prosecution best serve the public interest?"[157] Where Crown prosecutors cannot answer "yes" to both of these questions, the Deskbook indicates that "the prosecution should not proceed" and that any charges that have been laid should be withdrawn or a stay of proceedings should be entered.[158]

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[152] Canada Border Services Agency, "Evaluation of the Criminal Investigations Program" (22 January 2016) CBSA online: <https://www.cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2015/cip-pec-eng.html>.

[153] High-risk investigations are defined in the manual as cases presenting "aggravating factors" such as "previous enforcement or conviction, concealment and evidence of illicit or clandestine means".

[154] CBSA Enforcement Manual, Part 9 Investigations and Criminal Proceedings - Chapter 1, CBSA Prosecution Policy, May 25, 2012 (online at: < https://t.co/voFmaG6Mxa?amp=1>) at para 9.

[155] Canada, Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (2020) online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> accessed March 28, 2020 1.1-1.3 [PPSC, *Deskbook*].

[156] Ontario, Law Society of Ontario, *Rules of Professional Conduct* (online: 2020) <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct> accessed March 28, 2020, s 5.1. See also Adam Dodek, The Unique Role of Government Lawyers in Canada, 49 Isr. L. Rev. 23 (2016); PPSC, *Deskbook*, *supra* note 155 at preface and 2.3-1; Andrew Flavelle Martin, "Legal Ethics and the Political Activity of Government Lawyers, 2018" 49:2 *Ottawa Law Review* 263, 2018 CanLIIDocs 139 at 270.

[157] PPSC, *Deskbook*, *supra* note 155 at 2.3-2.

[158] *Ibid* at 2.3-2.

Given the unclear state of the case law discussed below, prosecutors may struggle to determine just how reasonable the prospect of conviction would be. Further, when determining whether prosecution is in the public interest, the Deskbook requires Crown prosecutors to consider a long list of factors, including "the accused's motivation".[159] As the motivations of colleges and universities wishing to admit PLS students align with the goal of making higher education equally accessible to all, a goal which is discussed in several human rights instruments to which Canada is a signatory,[160] prosecutors may conclude that imposing fines on (or even possibly jailing) educators for educating would bring the administration of justice into disrepute.[161]

Crown counsel could pursue prosecution nonetheless depending on their interpretation of their duty to "uphold the laws enacted by Parliament" by "ensuring compliance with a regulatory regime through prosecution", even "where the alleged offence is not so serious as to plainly require a prosecution".[162]

However, doing so would depart from PPSC materials discussing the *IRPA,* which make no reference to *IRPA*'s objective of maintaining "the integrity of the Canadian immigration system",[163] but which do focus on the "prosecution of criminal offences concerning human smuggling, and false documentation or passport fraud under the [*IRPA*]."[164]

While we argue that it would be an error to pursue criminal prosecution according to these guidelines, we recognize that crown counsel have broad discretion to pursue prosecution, and that challenging a decision to prosecute is not a viable strategy. As the SCC noted in *Appulonappa*, "judicial review of such discretion is not currently available" and that courts are extremely reluctant to permit routine judicial review of the exercise of prosecutorial discretion.[165]

A Comparison: Prosecutorial Discretion and Sanctuary Providers

Given the broad discretion accorded to CBSA officers and Crown counsel, it is worth considering how that discretion has been exercised in a comparable context: institutions and individuals who have provided "sanctuary" to unsuccessful refugee claimants.

There is a long tradition in Canada of religious organizations offering sanctuary to people facing removal from Canada who contend that their refugee claims were wrongly denied.[166] Typically this

[159] *Ibid* at 2.3-3.2(4).
[160] Please see discussion below, and footnotes 190-198.
[161] PPSC, *Deskbook*, *supra note* 155 at 2.3-3.2(6).
[162] *Ibid* at 2.3-3.2(1).
[163] *IRPA*, *supra* note 17 s 3(1)(f.1).
[164] PPSC, *Deskbook*, *supra* note 155 at 2.3-3.2; Canada, Public Prosecution Service of Canada, *The Legal Excellence Program* (online: 2019 Canada, Public Prosecution Service of Canada) <https://www.ppsc-sppc.gc.ca/eng/wop-oce/0502.html> accessed March 28, 2020.
[165] *Appulonappa, 2015, supra* note 122 at para 75; scholarly commentary has criticized the degree of court deference shown towards prosecutors in various contexts such as plea bargaining. See e.g., Marie Maninkis & Peter Grbac, "Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process" (2017) 40:3 Man LJ 85.
[166] See Sean Rehaag, "Bordering on Legality: Canadian Church Sanctuary and the Rule of Law" (2010) 26:1 Refuge 43 [Rehaag, Bordering on Legality]; Randy K. Lippert, "Rethinking Sanctuary: The Canadian Context, 1983-2003" (2005) 39:2 International Migration Review 381; Caroline Patsias and Nastassia Williams, "Religious Sanctuary in

involves the person facing removal remaining in a religious building (usually Christian churches) on the theory that, while immigration officials are not legally prevented from enforcing immigration law inside religious buildings, they are reluctant to do so given the negative publicity that would result. In many cases, this results in a de facto stay on removal, which frequently provides time for those in sanctuary to pursue (and frequently obtain) PR on humanitarian and compassionate ("H&C") grounds.

Individuals in sanctuary are generally breaching immigration law by remaining in Canada without authorization.[167] However, there are debates about whether sanctuary providers are also in breach of immigration law. Many sanctuary providers contend that they are not. Instead, they suggest that the Canadian state is at risk of breaching international law by deporting people who in fact meet the refugee definition, even if they are not recognized as such due to errors in the refugee determination system. Providers also suggest that all sanctuary providers are doing is increasing the political costs of breaking international law.[168] Other sanctuary providers concede that providing sanctuary is an unlawful act of civil disobedience designed to bring attention to unjust laws.[169]

Regardless, for our purposes, the important point is that the Canadian government views sanctuary providers as being in breach of the same sections of *IRPA* that we have discussed in this article: the counselling provision (section 131) and the catch-all provision (section 124).[170]

Despite this view, over the course of several decades,[171] there have been hundreds[172] of examples of Canadian religious organizations openly providing sanctuary to unsuccessful refugee claimants (including some on the front pages of newspapers),[173] and yet there has not been a single instance of a sanctuary provider being charged under the counselling or catch all offences.[174] This consistent pattern whereby discretion has been exercised not to pursue charges has persisted despite changes

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France and Canada" in Randy K Lippert & Sean Rehaag, eds, *Sanctuary Practices in International Perspectives* (London: Routledge, 2012) 175 at 182; Randy K Lippert, "Whither Sanctuary?" (2009) 26:1 Refuge 57; Randy K Lippert &Sean Rehaag, "Sanctuary in Context" (2009) 26:1 Refuge 3.

[167] More specifically, these individuals will generally be in violation of an enforceable removal order pursuant to s 48(2) of the *IRPA*. For a detailed discussion on this, see Rehaag, Bordering on Legality, *supra* note 166 at 48.

[168] See e.g., Robert Fleury, "Le droit d'asile des réfugiés" Le Soleil (29 July 2004) A15; Sean Rehaag, "No one is above the law on refugees" The Toronto Star (30 July 2004) A19; Catherine Dauvergne, "Why Judy Sgro is just plain wrong" The Globe and Mail (2 August 2004) A11; Mitchell Goldberg, "Why Sanctuary is Necessary" The Montreal Gazette (20 August 2004) A21.

[169] Randy K Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power, and Law* (Vancouver: University of British Columbia Press, 2005) at 143-150 [*Lippert, Sanctuary*].

[170] Rehaag, Bordering on Legality, *supra* note 166 at 49.

[171] See e.g., Lippert, *Sanctuary*, *supra* note 169 at 22.

[172] *Ibid* at 35.

[173] See the cases of Mohamed Cherfi and Amir Kazemian. Donna Sinclair, "The Cherfi arrest: Sanctuary violated" in The United Church Observer, online ed. (April 2004), online: <http://www.ucobserver.org/archives/apr04_nation.shtml>; Isabelle Porter, "Le Canada expulse le militant algérien Mohamed Cherfi" Le Devoir (6 March 2004) A5; Ingrid Peritz, "Algerian arrested in church denied asylum in U.S." The Globe and Mail (23 October 2004) A24; Louise Boivin, "100 demonstrate for deported man" The Montreal Gazette (7 March 2004) A5; Louise-Maude Soucy, "Le mouvement d'appui à Cherfi prend de l'ampleur" Le Devoir (10 March 2004) A5; "Refugee claimant's sup- porters demand his return from U.S." The Toronto Star (10 March 2004) A7; Petti Fong, "Iranian refugee granted asylum" The Globe and Mail (20 February 2007) A12.

[174] Rehaag, Bordering on Legality, *supra* note 166.

in government – even during periods where the political party in power made getting tough on "bogus" refugee claims a central plank of their platform.[175]

Between the guidance provided to CBSA officials and the Federal prosecutors and the past practice of not using the counselling and catch all provisions to charge individuals and organizations involved in providing sanctuary, there is a good argument to be made that post-secondary institutions which provide pathways for education for PLS students would not be subject to prosecution. Nonetheless, given the wide discretion enjoyed by CBSA officers and Federal prosecutors, we acknowledge that prosecutions are theoretically possible. We therefore now turn to a discussion of what could be done in the event that such charges are pursued.

Part 4: How Can Those Legal Impediments Be Addressed?

A Humanitarian Aid defence similar to the one carved out by the SCC for s. 117 in *Appulonappa* would be an appropriate remedy should charges ever be laid and prosecution pursued against post-secondary institutions for admitting PLS students without study permits. As the applicant in *R. v Boule* put it, it would be "absurd to suggest the government explicitly intended to exclude [humanitarian aid] from s. 117 yet still sought for it to be prosecutable elsewhere."[176]

The Humanitarian Aid defence was first established in *Appulonappa* and first raised in a case concerning the prosecution of the owner of the Sun Sea under s. 117,[177] but defined in *R v Rajaratnam.* In that case, the the British Columbia Court of Appeal ("BCCA") set out the following four elements comprising the defence:

> (i) the accused must act for the purpose of providing humanitarian aid, and not for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime;
>
> (ii) the accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, which is a person from another state who intends to seek refuge in Canada from persecution or physical harm;
>
> (iii) the aid must be humanitarian, a question to be determined by the trier of fact in accordance with the principles of impartiality, neutrality, and *Rajaratnam* independence; and
>
> (iv) the accused must reasonably believe that the person assisted is an asylum seeker.[178]

[175] Idil Atak, "The Securitisation of Canada's Refugee System: Reviewing the Unintended Consequences of the 2012 Reform" (2018) 37:1 Refugee Survey Quarterly 1 at 7-9; see also generally Petra Molnar Diop, "The 'Bogus' Refugee: Roma Asylum Claimants and Discourses of Fraud in Canada's Bill C-31" (2014) 30:1 *Refuge* 67.
[176] *R v Boule*, Applicant's Memo, *supra* note 120 at para 154.
[177] *R v Christhurajah*, 2017 BCSC 2455 (CanLII); *R v Christhurajah*, 2017 BCSC 1212 (CanLII).
[178], *supra* note 128 at para 275.

On first review, these elements do not readily lend themselves to the defence of educational institutions aiding students to study without study permits. However, these principles could be adjusted to suit the context, as the court cautioned that "a strict application of each of the principles as a necessary requirement would criminalize a broad swath of laudable conduct with no connection to transnational organized crime."[179]

Educating PLS students is laudable conduct which should be recognized as humanitarian aid. As discussed further below, the SCC's reasoning in *Appulonappa* and the subsequent discussions of humanitarian aid support a broader definition which could be used to defend schools implementing access programs. Although the humanitarian aid defence outlined above would be unworkable in its present formulation as it is married to the context of people smuggling, we agree with those who have described the sanctuary campus movement as "a humanitarian effort" focused on "supporting the right to live and learn".[180]

Let us turn to a discussion of each element of the Humanitarian Aid defence in its current formulation to consider how it may be adjusted to the question at hand.

Element 1 – Purpose of humanitarian aid not for financial or other material benefit

This requirement is adapted from the SCC's conclusion in *B010 v Canada* that reference to "a financial or other material benefit" was included as an element of the offences in the *Smuggling Protocol* to "exclude the activities of those who provided support to migrants for humanitarian reasons".[181] In *B010,* the SCC concluded that it is only permissible to criminalize those who are counselling, inducing, aiding or abetting migrants if they are "organized criminal groups acting for profit".[182]

If charged under the catch-all provision, educational institutions could certainly establish that their purpose was not to obtain a financial or other material benefit in the context of transnational organized crime.

Because schools hardly cover their costs when they admit PLS students as domestic students, they are not profitting from these actions.[183] Even if they were, the BCCA has clarified that an "ancillary financial motive" would not disqualify an accused from access to the Humanitarian Aid defence, but that evidence of a financial motive should instead be considered as a relevant factor in determining whether aid was humanitarian.[184] As an example, the BCCA noted that "a paid employee of a humanitarian organization who has a limited financial motive in exchange for their humanitarian work should not be deprived of a defence."[185] Colleges and universities admitting

[179] *Ibid* at para 245.
[180] Newman, *supra* note 10 at 153-154.
[181] *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 (CanLII) at para 60 [*B010*]. For a detailed discussion of this decision, see Lobat Sadrehashemi, "The MV Sun Sea: A Case Study on the Need for Greater Accountability Mechanisms at Canada Border Services Agency" (2019) 42:1 Dal LJ 213 [Sadrehashemi].
[182] *B010*, *supra* note 181 at para 60. For details about the role that the profit motive played in the Sun Sea cases, see Sadrehashemi, *supra* note 181 at 227-228.
[183] Aberman, *supra* note 13 at 15.
[184] *Rajaratnam*, *supra* note 128 at para 221.
[185] *Ibid*. In the context of s 91 of the *IRPA*, which details who can "represent or advise a person for consideration", IRCC has reportedly indicated that the phrase "for consideration" covers "anyone who receives a salary for their work,

PLS students are undoubtedly more akin to paid employees of humanitarian organizations than to members of human smuggling networks, meaning that any minimal profit would not detract from their ability to claim a similar Humanitarian Aid defence.[186]

Element 2 – Provide Aid in Order to Save the Life or Alleviate the Suffering of an Asylum Seeker

This element is more challenging to divorce from the context of people smuggling, where the courts were specifically focused on the provision of "humanitarian aid to asylum-seekers".[187] In that context, the focus on saving lives and alleviating suffering made sense. However, in another context the test could certainly consider if the aid was aimed at improving quality of life or preserving a fundamental human right. As discussed above, the PLS students who this paper concerns live in circumstances of vulnerability and precarity marked by lack of access to legal protections, decreased labour mobility and significant mental health impacts.[188] Access programs are not focused on saving the lives of asylum seekers, they are focused on protecting a fundamental human right: access to education.

In *Appulonappa*, the SCC noted that "legislation is presumed to comply with Canada's international obligations".[189] In the present context, it is important to note that Canada is bound by several international instruments which explicitly support the goal of ensuring that students have equitable access to postsecondary education.

For example, Canada is a party to the *Convention on the Elimination of All Forms of Racial Discrimination* ("*CERD*"), which requires state parties to agree to "prohibit racial discrimination in all its forms and guarantee the right of everyone ... [t]o education and training."[190] Some academics haved noted that the *CERD* "should be read in the context of international human rights norms" which "do not serve to condone invidious discrimination against undocumented immigrants."[191]

In addition, the *Convention on the Rights of the Child* ("*CRC*") mandates that state parties "make higher education accessible to all on the basis of capacity".[192] Although the right to education in the *CRC* "strictly speaking only applies to primary education",[193] the language with respect to higher education in the *CRC* is notable, as are the specific references to non-discrimination in the

including at an NGO, even if the services offered are free". Canadian Council for Refugees, "IRPA section 91: Assisting people with immigration processes" (September 2019).

[186] *Appulonappa, 2015*, *supra* note 122 at para 51.

[187] *Ibid* at para 86, *Rajaratnam*, *supra* note 128 at paras 225, 228.

[188] See discussion at part 2, above.

[189] *Appulonappa, 2015*, *supra* note 122 at para 40.

[190] United Nations Office of the High Commissioner of Human Rights, "Ratification of 18 International Human Rights Treaties" (2020) online: <https://indicators.ohchr.org/>.

[191] Azadeh Shahshahani & Chaka Washington, "Shattered Dreams: An Analysis of the Georgia Board of Regents' Admissions Ban from a Constitutional and International Human Rights Perspective" (2013) 10:1 Hastings Race & Poverty LJ 1 at 17, 14-15 [Shahshahani & Washington].

[192] *Ibid* at 19. See also Gregory M. Dickinson, "The Right to Education in Canada: A Difficult Beast to Tame" (2005) 1 Intl J for Education L & Policy 47 at 52 [Dickinson].

[193] Samantha Arnold, *Children's Rights and Refugee Law: Conceptualising Children within the Refugee Convention* (London: Routledge 2018) at 150 [Arnold].

context of the socio-economic circumstances of children and families, as this acknowledges "that social and economic disadvantage may increase the risk of a violation of the right to education."[194]

Similarly, the *Universal Declaration on Human Rights* ("*UDHR*") states that "[e]veryone has the right to education" and that "higher education shall be equally accessible to all on the basis of merit."[195] International legal scholars have indicated that Canada is subject to the "moral suasion" of the *UDHR*, which has "entered the canon of customary international law".[196]

Most significantly, the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*") provides that, as a state party, Canada recognizes "the right of everyone to education" and that "[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means".[197] The Committee on Economic, Social and Cultural Rights confirmed that this "principle of non-discrimination extends to all persons [...] irrespective of their legal status".[198]

Taken together, these international instruments demonstrate that it is contrary to Canada's international obligations to restrict PLS students from accessing post-secondary education. As Canada has failed to exercise every appropriate means to ensure equal access to post-secondary education for PLS students, Canadian colleges and universities would be providing aid in order to ensure that higher education be made accessible to all irrespective of nationality or legal status.

Element 3 – Is the Aid "Humanitarian"?

The most challenging definitional aspect of the test would be establishing that educating PLS students without study permits constitutes humanitarian aid.

The term "humanitarian aid" was not defined by the SCC in *Appulonappa*. This was perhaps intentional, as the CBSA's failure to provide guidance on how to identify "bona fide humanitarians" was at issue in lower level decisions.[199] As the BCCA wrote in 2014:

> An examination of the terms "humanitarian" or "altruistic" demonstrates the legitimacy of these concerns. Such words are inherently subjective and imprecise, and rest on motive alone. Can one be a self-declared humanitarian? Will membership in any non-governmental organization, church, or a registered charity suffice? Is it enough that one does not profit from providing assistance? A question of purity of motive arises as well.[200]

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[194] *Ibid* at 47.
[195] Adopted and proclaimed by General Assembly resolution 217 A (III) of December 1948.
[196] Dickinson, *supra* note 192 at 52; Shahshahani & Washington, *supra note 191*, at 23. For a discussion of customary international law, see Jeffrey L. Dunoff, Steven R. Ratner and David Wippman, *International Law Norms, Actors, Process: A Problem-Oriented Approach, Fourth Edition* (New York: Wolters Kluwer, 2015) at 379-381.
[197] Canada ratified the ICESCR in 1976. Dickinson, *supra* note 192 at 52; G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6 316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.
[198] *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13, The Right to Education*, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999). For a discussion of these rights see Shahshahani & Washington, *supra* note 191 at 17; Arnold, *supra* note 193 at 46-47, 147-148.
[199] *R v Appulonappa*, 2014 BCCA 163 at para 98 [*Appulonappa, 2014*].
[200] *Ibid* at para 108.

In this decision, the BCCA both rejected the respondents' argument that it was incumbent on parliament to comprehensively define an exemption for humanitarians under s. 117 despite this imprecision, and that parliament intended for the Attorney General to enforce this exemption through discretion.[201] Notably, in overturning this decision, the SCC came to the opposite conclusion, writing that s. 117 was drafted broadly "not because Parliament wanted to capture" those providing humanitarian assistance, but because of a "drafting dilemma": "Parliament agreed that those offering humanitarian assistance and mutual aid were not meant to be prosecuted under s. 117 of the *IRPA*. However, instead of legislatively exempting such people from potential criminal liability, it sought to screen them out at the prosecution stage".[202]

While the decision speaks of humanitarian aid in terms of helping people "to flee from persecution"[203] it also discusses *IRPA*'s "broad humanitarian aims" in the following terms:

> Section 3(2)(c) speaks of "Canada's humanitarian ideals". The stated objects include "saving lives and offering protection to the displaced and persecuted" and "safe haven to persons with a well-founded fear of persecution": ss. 3(2)(a) and 3(2)(d). **Similarly, the objectives include striving to comply with "international human rights instruments to which Canada is signatory": s. 3(3)(f); see also s. 3(2)(b).** [emphasis added][204]

In light of the commitment to making higher education accessible to all without discrimination in the international human rights instruments to which Canada is a signatory, it is certainly conceivable that a program with the specific aim of ensuring non-discriminiation in access to post-secondary education could fall under the "humanitarian aid" umbrella discussed by the SCC in *Appulonappa.*

Moreover, several of the *IRPA*'s other statements of legislative purpose would support the admission of PLS students to postsecondary institutions. Section 3(1) of the *IRPA* states that the *Act*'s objectives with respect to immigration include permitting Canada "to pursue the maximum social, cultural and economic benefits of immigration", "to support the development of a strong and prosperous Canadian economy" and "to promote the successful integration of permanent residents into Canada".[205] Allowing students who, in many cases, have been educated in Canadian public schools to continue their educations would not only allow individual students to better achieve their goals, it would also allow them to more fully integrate into Canadian society and to more fully participate in and contribute to the formal Canadian economy, rather than locking them into precarious work in an informal economy in which they are likely to be exploited.

If only relying on SCC jurisprudence which considers humanitarian goals more broadly, access programs would seem to fit well within this broader definition of humanitarian aid.

However, subsequent BCCA decisions make this more challenging. In *Rajaratnam* the court explicitly rejected arguments that the word "humanitarian" should simply be given its plain and ordinary meaning. Instead, the court found that the defence should be given legal meaning to avoid

[201] *Ibid* at para 111.
[202] *Ibid* at para 66.
[203] *Appulonappa, 2015, supra* note 122 at para 30.
[204] *Ibid* at para 55.
[205] *IRPA, supra* note 17 s 3(1)(a), 3(1)(c), 3(1)(e).

the danger of inadequately charging juries on the defence.[206] The court also rejected arguments that the term "humanitarian aid" could be considered based on the flexible and equitable test established in *Kanthasamy* of what would "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another".[207]

The reasoning in *Appulonappa* would be more persuasive to a court considering charges under the catch-all and counselling provisions than the BCCA's in *Rajaratnam*. Nonetheless, it is worthwhile to consider whether educating PLS students could fit into the BCCA's definition of humanitarian aid, which turns on "how well the accused's actions conformed to the principles of impartiality, neutrality, and independence."[208]

If faced with charges, schools with access programs could persuasively argue that educating PLS students conformed to the principles of impartiality, neutrality, and independence. However, it would be important to note that the BCCA adopted these definitions from the Glossary of Humanitarian Terms in relation to the Protection of Civilians in Armed Conflict.[209] Accordingly, they are only helpful to a limited extent in contexts where there is no imminent threat. This is not fatal, however, as the court emphasized that these three principles are not strict requirements to access the defence.[210]

The BCCA defined impartiality as the principle that "[h]umanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions."[211]

As discussed above, access programs are intended to overcome barriers to post-secondary education so that education may be equally accessible to all students in Canada regardless of distinctions based on immigration status. Because PLS students come from all over the world and a large proportion of them are racialized, access programs also minimize distinctions based on race and nationality. Although the discussion of distress is not particularly applicable in this context, access programs are certainly carried out on the basis of need alone, and are entirely impartial in their acceptance of students.

Next, the court's definition of neutrality focuses on the principle that "[h]umanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature."[212] Once again, the reference to hositilities is not applicable in this context. Access programs are ideological to the extent that they prioritize equal access to education over the controversy of admitting PLS students without study permits, but they are neutral in the sense that they intend for campuses to be safe spaces where students can learn despite the political restrictions which impose barriers on their actions and choices elsewhere.

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[206] *Rajaratnam*, *supra* note 128 at paras 182-184.
[207] *Ibid* at paras 183, 188.
[208] *Ibid* at para 208.
[209] *Ibid* at para 229.
[210] It should be noted that the BCCA rejected the inclusion of "humanity", meaning "the centrality of saving human lives and alleviating suffering wherever it is found" from this list of principles because "it is covered by the requirement that the purpose of humanitarian aid be to save lives or alleviate suffering. *Ibid* at paras 231, 239, 242.
[211] *Ibid* at para 241.
[212] *Ibid*.

Finally, the court defines independence as action that is "autonomous from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented."[213] Access programs are most certainly autonomous – by admitting PLS students, colleges and universities would be acting in the interest of students' educations in a way that is independent from the political/economic constraints which makes administering the programs challenging.

The aid provided in access programs is more easily aligned with the SCC's discussion of humanitarian aid and humanitarian ideas. However, even if a court preferred the BCCA's more restrictive definition, the aid provided by access programs could certainly still be defined as humanitarian.

Element 4 – Reasonable Belief that the Person is an Asylum Seeker

The final element of the BCCA's Humanitarian Aid defence is whether the accused had a reasonable belief that the individual assisted was an asylum seeker.

Notably, the court included this requirement to encourage "reasonable and responsible behaviour" and to discourage reckless behaviour that would endanger the provision's effectiveness.[214] If this element were to be adapted so that the requirement was to demonstrate that the accused had a reasonable belief that the person was in need of their aid, the element could easily be met.

Certainly, by admitting PLS students and not only asylum seekers, post-secondary institutions would be disregarding the Federal government's classification of which students are eligible to study. However, this is hardly reckless. Instead, it is an acknowledgment that the law unfairly prohibits many academically qualified students from accessing post-secondary education, contrary to Canada's commitments in various human rights instruments. If the school could demonstrate that they had verified that the student in question would be barred from pursuing post-secondary education in Canada due to their immigration status without an access program, then they could meet this element of an adapted Humanitarian Aid test.

Conclusion regarding Humanitarian Aid Defence

While there is no case law directly on point, the BCCA's decision in *Rajaratnam* provides a framework which, although not perfectly well-suited to the question at hand due to its focus on asylum seekers and "life-saving" aid, could nonetheless provide the framework for a defence for those educating PLS students and ensuring equal access to higher education.

The SCC's reasoning in *Appulonappa* and the subsequent discussions of humanitarian aid support a broader definition of humanitarian aid which could be adopted to defend schools with access programs. While the *Boule* decision has increased the likelihood that a college or university admitting PLS students without study permits could theoretically be charged under the catch-all provisions, the laying of such a charge remains unlikely. Furthermore, should such a charge be laid

[213] *Ibid*.
[214] *Ibid* at para 254.

and prosecuted, the contested notions of what constitutes humanitarian aid outlined as a defence in *Rajaratnam* could be adapted to the context of access programs.

Comparison to American Context

This conclusion is further supported by comparing the Canadian counselling provision with the "harboring" laws in the American *Immigration and Nationality Act* ("*INA*"). The *INA* provides that anybody "who knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the US in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; shall be punished."[215] The *INA* states that those prosecuted can be punished with up to five years of incarceration, with even stiffer penalties where these acts are committed for commercial advantage or financial gain.[216]

There is a long history in the US of humanitarian workers facing criminal charges pursuant to these and other provisions for providing humanitarian aid to migrants,[217] but activists noted an increase in the "warrantless surveillance, interrogations, invasive searches, travel restrictions" and arrests of human rights defenders under the Trump administration.[218] The most high-profile of these cases was the prosecution of Dr. Scott Warren for "harbouring" two migrants by leaving water and food in remote desert locations for migrants crossing on foot from Mexico.[219] Amnesty International decried the prosecution as a "cynical misuse of the justice system, intended to criminalize compassion and lifesaving humanitarian aid".[220]

The harboring laws are a source of significant concern amongst American legal scholars discussing sanctuary campus policies, who warn that advising undocumented students in a way "that seems to be helping them to avoid detection or to further violate the immigration laws" could "come too close to harboring", as would "knowingly providing a student with shelter".[221]

These prosecutions and convictions in the US, including recent examples of church officials being prosecuted for providing housing to "unauthorized aliens" (which was perceived as "deliberately

[215] Raquel Aldana, Beth Lyon & Karla Mari McKanders, "Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students" (2012) 44:1 Ariz St LJ 5 at 43 [Aldana, Lyon & McKanders].
[216] *Ibid*.
[217] See generally Kristina M Campbell, "Humanitarian Aid Is Never a Crime: The Politics of Immigration Enforcement and the Provision of Sanctuary" (2012) 63:1 Syracuse L Rev 71; Allan Colbern, Melanie Amoroso-Pohl & Courtney Gutierrez, "Contextualizing Sanctuary Policy Development in the United States: Conceptual and Constitutional Underpinnings, 1979 to 2018" (2019) 46:3 Fordham Urb U 489.
[218] Amnesty International, "USA: Authorities are misusing justice system to harass migrant human rights defenders" (2 July 2019) online: <https://www.amnesty.ca/news/usa-authorities-are-misusing-justice-system-harass-migrant-human-rights-defenders%C2%A0>.
[219] Jasmine Aguilera and Billy Perrigo, "They Tried to save the Lives of Immigrants Fleeing Danger. Now They're Facing Prosecution" *Time* (11 November 2019) online: <https://time.com/5713732/scott-warren-retrial/>.
[220] Amnesty International, "USA: Drop abusive criminal charges against humanitarian volunteer Scott Warren" (7 November 2019) online: <https://www.amnesty.org/en/latest/news/2019/11/usa-drop-criminal-charges-against-scott-warren/>; Amnesty International, "USA: Exoneration of Scott Warren is a triumph for humanity" (20 November 2019) online: <https://www.amnesty.org/en/latest/news/2019/11/usa-exoneration-scott-warren-triumph-for-humanity/>.
[221] Aldana, Lyon & McKanders, *supra* note 215 at 49, 52.

safeguard[ing] members of a specified group from the authorities")[222] would be untenable in Canada.

There is no Canadian legislation which explicitly criminalizes concealing, harbouring or shielding individuals without legal status from being detected by immigration authorities. The closest equivalent in Canada are the human smuggling and the aiding and abetting provisions discussed above.

Similar prosecutions have occurred in Canada, but with notably different results. In 2007, many years before the *Appulonappa* decision, refugee aid worker Janet Hinshaw-Thomas was arrested and charged under s. 117 after she "drove 12 Haitian nationals to the U.S.-Canada border so that they could claim asylum".[223] While the charges against Hinshaw-Thomas were dropped after a significant public outcry, in *R v. Callahan*, an American who "acted only for humanitarian purposes" in assisting two undocumented migrants to cross the Canadian border plead guilty to s. 117 in 2012 and was sentenced to pay a $5,000 fine.[224]

These cases were discussed at some length in the BCCA decision overturned by the SCC in *Appulonappa*.[225] Although the SCC did not ultimately comment on either case in its decision, the decision clearly established that those charges and convictions were unconstitutional.

Unlike other jurisdictions, which have explicitly chosen to criminalize humanitarian assistance to PLS migrants,[226] Canadian legislators have discussed and rejected the implementation of such penalties. This suggests that the Canadian catch-all and counselling provisions should not be interpreted to include such assistance.

Conclusion Regarding the Catch-All Provisions

It is conceivable that colleges or universities admitting PLS students could be charged pursuant to the penalties outlined in s. 125 of the *IRPA.* However, if such a charge is ever laid and prosecuted a Humanitarian Aid defence similar to the one carved out by the SCC for s. 117 in *Appulonappa* would be an appropriate remedy.

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[222] Dukic, Gold & Lisa, *supra* note 10 at 43 and 25-27.

[223] See Unnati Gandhi, "Crown drops human smuggling charges", *The Globe and Mail* (9 November 2007) online: <https://www.theglobeandmail.com/news/national/crown-drops-human-smuggling-charges/article697456/>; Canadian Council for Refugees, "Proud to aid and abet refugees" (2007) online: <https://ccrweb.ca/sites/ccrweb.ca/files/static-files/aidandabet/index.htm>; Bernard Amyot, "Re: Janet Hinshaw-Thomas", letter from the Canadian Bar Association to the Attorney General of Canada, (25 October 2007) online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=f1a64a30-835b-44a1-b436-b995e36d8ae7>.

[224] *Appulonappa, 2014*, *supra* note 199 at para 104.

[225] Interestingly, the BCCA determined that the Hinshaw case had little utility in the analysis because information about whether she had been designated a "humanitarian" by the law enforcement agencies was absent, but the *Callahan* decision allowed the BCCA to conclude that the Attorney General had consented to the institution of proceedings against a humanitarian. *Ibid* at para 92-105.

[226] The criminalization of humanitarian aid appears to be increasing in various European countries as well. See, e.g., Sara Bellezza & Tiziana Calandrino, eds, *Criminalization of Flight and Escape Aid* (Berlin, Germany: Borderline-Europe, 2017); Sergio Carrera et al, *Policing Humanitarianism: EU policies against human smuggling and their impact on civil society* (London, UK: Hart Publishing, 2019).

Part 5: Regardless of Lawfulness, More Access Programs Should Be Initiated

Finally, even if it were theoretically possible for colleges and universities to be penalized for aiding and abetting PLS students to study without study permits, there are compelling reasons for postsecondary institutions to admit these students nonetheless. The adoption of programs that ensure access to colleges and universities for all students regardless of immigration status would acknowledge the fact that PLS students, many of whom have been educated to the end of secondary school in Canada, often reasonably assume that they will be able to pursue post-secondary education upon graduation.

The wider adoption of Access Programs would also make access to post-secondary education in Canada significantly more equitable; policies which make post-secondary education inaccessible to PLS students, who we know are disproportionately racialized and unable to afford high tuition fees, make access to post-secondary education dependent upon a student's race, class and immigration status. Access programs allow Canadian colleges and universities to live up to their "special responsibility" to "combat the evils that flow from inequality", "to promote the fundamental worth and human dignity of each member of society" and to "fulfill their roles" as society's "great equalizers".[227] The wider adoption of such programs would also make it clear to these students that Canadian educators believe that they "deserve protection"[228], that "they are welcome, on campus and off" and that they are equally deserving of the promises offered by a postsecondary education as their Canadian citizen and PR peers.[229]

Therefore, if the law purports to prohibit postsecondary institutions from pursuing such programs, this is one of the limited circumstances where pushing back against the law – and breaking the law in order to challenge its constitutionality – would be warranted.

Examples of Post-Secondary Resistance to Restrictive American Laws

Much can be learned, in this respect, from the available literature in the US, where "illegal" immigration has been the subject of more discussion than it has in Canada.[230] American Federal law does not "explicitly prohibi[t] undocumented students from being admitted to colleges", but it does prohibit them from receiving Federal financial aid.[231] As such, Federal law is "permissive of

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[227] William Smith and William Foster, "Equality in the Schoolhouse: Has the Charter Made a Difference?" in Michael Manley-Casimir & Kirsten Manley-Casmir, eds, *The Courts, the Charter, and the Schools: The Impact of the Charter of Rights and Freedoms on Educational Policy and Practice* (Toronto: University of Toronto Press, 2009) 14 at 149; Green, *supra* note 10 at 1044. Although we focus on access to education, please note that "Canadian study experience does not necessarily guarantee an immigrant's economic success in the Canadian labour market." See Yuqian Lu & Feng Hou, "Student Transitions: Earnings of Former International Students in Canada's Labour Market" in Ann H. Kim and Min-Jung Kwak, eds., *Outward and Upward Mobilities: International Students in Canada, Their Families, and Structuring Institutions*, (Toronto: University of Toronto Press, 2019) 219 at 220.

[228] The wider adoption of access programs raises further questions which colleges and universities must grapple with to make PLS students feel truly safe on campus. Many sanctuary campuses in the US have policies about sharing documents and information with immigration officials and about permitting immigration officials access to campus. Much of the American scholarship discusses the enforceability of these policies. We encourage further Canadian scholarship on these issues. See, e.g., Dukic, Gold & Lisa, *supra* note 10 at 33-42.

[229] Green, *supra* note 10 at 1076.

[230] For a discussion of the "differences in the production of migrant illegality" between Canada and the US, see Goldring, Berinstein & Bernhard, *supra* note 3 at 245-246.

[231] Newman, *supra* note 10 at 152. See also Espinosa, *supra* note 10 at 156.

state laws and practices that allow the admission of undocumented students and grant in-state tuition and other state aid to such students."[232]

However, state level laws in the US vary dramatically, with some providing financial aid for eligible undocumented students or redefining state residency requirements to make undocumented students eligible for financial aid, and others adopting explicitly anti-undocumented immigrant laws.[233] While some states prohibit undocumented students from qualifying for in-state tuition,[234] others explicitly ban them from enrolling in certain public colleges.[235]

As a result, the American literature provides helpful case studies in how colleges and universities have responded to the ethical dilemma of receiving applications from academically qualified undocumented students in circumstances where the law explicitly prohibits schools from admitting them. Georgia, for example, is a state where colleges and universities have continued to support and admit undocumented students despite extremely restrictive laws. In 2010, the Georgia Board of Regents instituted a policy barring all students who were not "lawfully present" in the country from the state's top five postsecondary public schools.[236] Following mass demonstrations staged by thousands of college students to push their respective schools to declare themselves as "sanctuary campuses",[237] Georgia passed the country's first "anti-sanctuary campus bill" in 2017, which cut off state funding to Georgia colleges that declare themselves "sanctuary campuses".[238]

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[232] Newman, *supra* note 10 at 140; Aldana, Lyon & McKanders, *supra* note 215 at 42. For details about the laws governing provincial financial aid, which differ from American laws see Ben-Ishai, *supra* note 65 at 215-216.

[233] We encourage provinces and territories to consider looking to American examples in these states to open up provincial financial aid to PLS students. For a discussion of some of these policies see Olivia Osei-Twumasi and Guadalupe Lopez Hernandez, "Resilience in the Face of Adversity: Undocumented Students in Community Colleges" in Carola Suarez-Orozco & Olivia Osei-Twumasi eds, *Immigrant-Origin Students in Community College: Navigating Risk and Reward in Higher Education*, (New York: Teachers College Press, 2019) 46 at 48 and Aboytes, *supra* note 10. For details about past Federal changes in Canada expanding student financial aid to refugees, see Slobodian & Kits, *supra* note 67.

[234] Aboytes, *supra* note 10 at 595-596.

[235] Newman, *supra* note 10 at 139. For a comprehensive look at each state's policies regarding undocumented students and their ability to enroll in postsecondary institutions, see Higher Ed Immigration Portal, "Portal to the States" (2022), online: < https://www.higheredimmigrationportal.org/states/>.

[236] Jonathan Blitzer, "An Underground College for Undocumented Immigrants" (15 May 2017) The New Yorker, online: <https://www.newyorker.com/magazine/2017/05/22/an-underground-college-for-undocumented-immigrants> [Blitzer]. This bar was subsequently upheld. Bill Rankin & Eric Stirgus, "Atlanta court upholds University System ban on unauthorized immigrants" (6 March 2019) *The Atlanta Journal-Constitution* online: <https://www.ajc.com/news/local/atlanta-court-upholds-university-system-ban-unauthorized-immigrants/IxwkDzIV8VAwjRHY76fPiK/>.

[237] Newman, *supra* note 10 at 133.

[238] Sanctuary Campus petitions typically asked colleges or universities to (1) "refuse access to immigration officials on campus without a warrant," to (2) "refuse to participate in any voluntary sharing of information with immigration officers or agencies," and to (3) "prohibit inquiry into or the recording of an individual's immigration status." Many American legal academics have weighed in on this debate, arguing that "state laws prohibiting education are unconstitutional" because they are contrary to the *Plyler v Doe* decision, which guaranteed access to schooling for all minor resident children in the US. See Espinosa, *supra* note 10 at 142; Newman, *supra* note 10 at 133, 138-139, 155-156; Aldana, Lyon & McKanders, *supra* note 215 at 72; Green, *supra* note 10 at 1043; and Holley-Walker, *supra* note 10 at 361-362. See also Laura Emiko Soltis & Azadeh Shashahani, "When Undocumented Youth Are Banned From College, The Entire Nation Fails" (22 August 2018) *Huffpost* online: <https://www.huffpost.com/entry/opinion-undocumented-immigrants-daca-college_n_5b7d408ae4b0cd327df84eda>; Greg Bluestein, "New Georgia law strips state funding of 'sanctuary' campuses" (27 April 2017) *Atlanta Journal-Constitution* online:

Despite the increasingly hostile nature of this legislation, students, academics, local activists, colleges and universities in Georgia have found creative ways of opposing the legislation, drawing inspiration from the "clear historical connection between communities of color" (as the schools banning undocumented students, who primarily came from Mexican and Central American backgrounds, were "the same institutions that banned Black students a half-century before") and drawing on the experiences of the Civil Rights activists who were integral to de-segregating those same campuses in the 1960s.[239] For example, faculty members from the University of Georgia, a school initially barred from admitting undocumented students, were instrumental in running a school for undocumented students shut out of public universities and in staging a series of events on campus called "Celebrating Courage", including an action to integrate a university classroom.[240] Another university in Georgia, Emory University, backed away from the "sanctuary campus" label, but still offers financial assistance to aid undocumented students. It also provides them with access to the university's legal aid clinic. [241]

American colleges and universities are doing all of this despite clear indications from American legal scholars that the "interpretation of the harboring provisions is largely unsettled" and that there is "little precedent that addresses when a college may be guilty of harboring an illegal alien".[242]

The situation is significantly less tenuous in Canada. Instead of broad anti-harbouring laws, we have a series of court decisions which explicitly exempt humanitarian assistance to migrants from prosecution. The Canadian legal system also has a long history of largely respecting other forms of humanitarian assistance to people with precarious status, including religious organizations and refugee houses such as FCJ Refugee Centre, which offer sanctuary to people facing deportation.[243]

As outlined above, PLS students in Canada face many of the same barriers to accessing education as their counterparts living in the US. However, these barriers have remained largely invisible in Canada. Whereas undocumented immigration is highly visible in the American media and often characterized as a "Latino threat" because this migration comes "primarily from Mexico across the southern border", the topic "remains largely outside the agenda of public discussion" in Canada, where "other pathways to illegality and precarious immigration are more common" and where "people with precarious status also tend to be negatively racialized".[244] Whereas "silence" has been identified as a "fundamental part of the undocumented experience" in the US and the rejection of

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<https://www.ajc.com/blog/politics/new-georgia-law-strips-state-funding-sanctuary-campuses/wYE4SVFqSn83PVUI3ITf2I/> [Bluestein].

[239] Soltis, *supra* note 11 at 21-22; Blitzer, *supra* note 236; Matt Vasilogambros, "The Folly of Under-Educating the Undocumented" (16 March 2016) *The Atlantic* online: <https://www.theatlantic.com/politics/archive/2016/03/the-folly-of-under-educating-the-undocumented/473877/>.

[240] Blitzer, *supra* note 236.

[241] Bluestein, *supra* note 238; Emory University School of Law, "Emory Immigrant Legal Services" (2019) online: <http://law.emory.edu/academics/clinics/student-led-clinics/emory-immigrant-legal-services.html>.

[242] Dukic, Gold & Lisa, *supra* note 10 at 46.

[243] Sean Rehaag, "Bordering on Legality: Canadian Church Sanctuary and the Rule of Law" (2009) 26:1 Refuge 43 at 44. See also a discussion about the "emphasis on legality" in Canadian sanctuary practice in Julie Young, ed, "Seeking sanctuary in a border city: Sanctuary movement(s) across the Canada-US border" in Randy K. Lippert and Sean Rehaag, eds, *Sanctuary Practices in International Perspectives: Migration, citizenship and social movements* (New York: Routledge, 2013) 232 at 240-242.

[244] Goldring, Berinstein & Bernhard, *supra* note 3 at 241 and 245-246; Meloni, *supra* note 13 at 457.

this silence has galvanized youth-led organizations to document "silenced histories" by "coming out" as undocumented at public events,[245] Canadian scholars have noted that PLS youth in Canada "have rarely engaged" in the same kinds of "large political movements" seen in the US.[246] The experiences of PLS youth living in Canada have instead been defined by "institutional invisibility" and by their occupation of "socio-legal spaces of non-existence".[247]

It is therefore time for students and faculty on Canadian campuses to mobilize on behalf of PLS students, making their struggles visible without requiring PLS students to publicly "out" themselves. If students and faculty on American campuses can develop strategies to provide access to PLS students in the face of significant legal barriers, then we can certainly do the same, if not more, in a context where those barriers are more tenuous. We therefore encourage Canadian colleges and universities to consider how they can follow John Lewis' advice to "get in the way and find a way" to ensure that PLS students are educated, even if that means "mak[ing] a way out of no way".[248]

Conclusion

Initial feedback from students in York University's Access Program demonstrates how impactful such programs can be: those involved in one study reportedly "responded with a resounding yes" when asked "whether the Access Program should continue", and talked about how their "participation in the program increased their access to networks, resources, and the possibility of entering university".[249] Several students who participated in the program and went on to enrol as full-time students at York University, including Salma, who's story began this paper, have now become PRs.[250]

We note, however, that opening doors to PLS students will not be enough on its own. Numerous studies have demonstrated that once PLS students have enrolled in postsecondary education, they have experienced a variety of barriers to educational success ranging from financial concerns to campus climate and opportunities for further advancement.[251] The American literature demonstrates that institutional support once students arrive on campus is also essential, as a "lack of knowledge and will to support" PLS students on campus has been identified as a "source of trauma" making "students feel a heightened sense of discrimination" based on "intersectional

[245] Genevieve Negrón-Gonzales, "Undocumented, Unafraid, and Unapologetic: Re-articulatory Practices and Migrant Youth 'Illegality'" (2014) 12:2 Latino Studies 259 at 271-272.
[246] Meloni, *supra* note 13 at 476.
[247] *Ibid* at 457-458.
[248] Blitzer, *supra* note 236.
[249] Villegas & Aberman, *supra* note 6 at 53 and 78.
[250] Some of the dedicated community advocates who helped these students to prepare their applications for PR on H&C grounds believe that including evidence of their enrollment at York University was key to their applications' success. This reflects the experience of one of the paper's co-authors, Francisco Rico Martinez, who (through the FCJ Refugee Centre) engaged with many of the students involved in the program and with advocates who assisted them with H&C applications, several of which have been successful. However, as noted above, H&C applications are highly discretionary and non-transparent processes, and it can be difficult to predict how a particular factor will influence outcomes. See above note 19.
[251] Villegas, P., *supra* note 13 at 247.

factors of race, class, immigration status, and family histories".[252] At many American schools, this consideration has led to the adoption of "Dream Resource Centers" to assist undocumented students on campus.[253] Canadian institutions should carefully consider what additional interventions they can implement to ensure educational equity and success for the PLS students who they admit.[254] Indeed, those who have worked closely with PLS students at York University regularly encounter new challenges and barriers specific to PLS students. They feel strongly, however, that the majority of PLS students' challenges can be overcome if students feel that they can trust that university staff will understand, identify, and address those challenges.[255]

PLS students face distinct legal barriers to accessing postsecondary education in Canada, including their inability to obtain study permits, the fact that they are often charged the same tuition fees as international students and the fact that they are ineligible for student loans or other bursaries. These barriers perpetuate a system whereby access to post-secondary education is defined by a student's race, class and immigration status. The Access Program at York University provides a roadmap for how colleges and universities in Canada can lessen these barriers.

We hope that the analysis outlined above will reassure colleges and universities considering similar programs that they are significantly less likely than their American counterparts to face penalties stemming from Federal immigration laws for admitting and educating PLS students who do not possess study permits. As has been demonstrated, prosecution of educators does not align with CBSA and Crown prosecution priorities – the penalties outlined in s. 125 of the *IRPA* are unlikely to be applied to educators as a result. Even if these charges were laid, however, a Humanitarian Aid defence similar to the one carved out by the SCC for s. 117 in *Appulonappa* could provide protection in those circumstances. At any rate, laws which purport to prohibit educational institutions from admitting entire classes of people based on their legal status alone are laws which can and should be resisted – as many institutions in the US have demonstrated.

By admitting PLS students at domestic fees, postsecondary educational institutions could help Canada to abide more fully by its obligations under international law to ensure that higher education is made equally accessible to all. They would also send an important message to PLS students like Salma: that they are welcome on Canadian college and university campuses and that they are equally worthy of a postsecondary education as their PR and Canadian citizen peers.

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[252] Michael Rabaja Manalo-Pedro, "The Role of a Dream Resource Center at a CSU: How Institutional Agents Advanced Equity for Undocumented Students through Interest Convergence" (2018) UCLA Electronic Theses and Dissertations online: <https://pdfs.semanticscholar.org/1025/b9b39cae7e46c0ef07535f03d88a5dfe0a7b.pdf> at 31-32.
[253] Villegas, P., *supra* note 13 at 248. See also generally Ruben Elias Canedo Sanchez and Meng L. So, "UC Berkeley's Undocumented Student Program: Holistic Strategies for Undocumented Student Equitable Success Across Higher Education" (2015) 85:3 *Harvard Educational Review* at 464*;* International Human Rights Law Clinic, "DREAMers at Cal: The Impact of Immigration Status on Undocumented Students at the University of California at Berkeley" (2015) University of California, Berkeley, School of Law. Available online at: <https://www.law.berkeley.edu/wp-content/uploads/2015/05/DREAMersReport2.pdf>; *Ibid*.
[254] For example, some PLS students at York University have encountered barriers in completing mandatory practicum placements which require documentation that they are unable to provide.
[255] Correspondence with York University's Access Program Coordinator, August 30, 2020, on file with author.